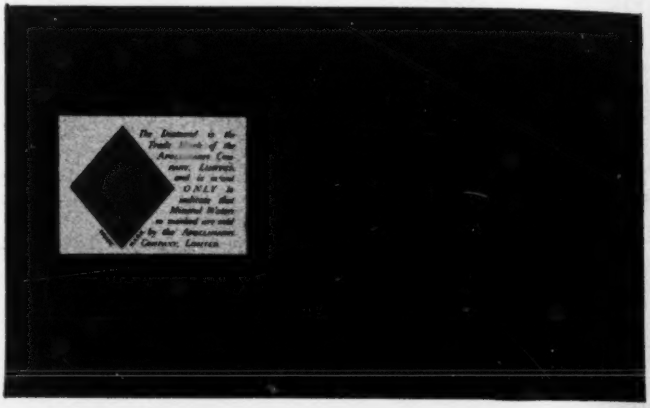
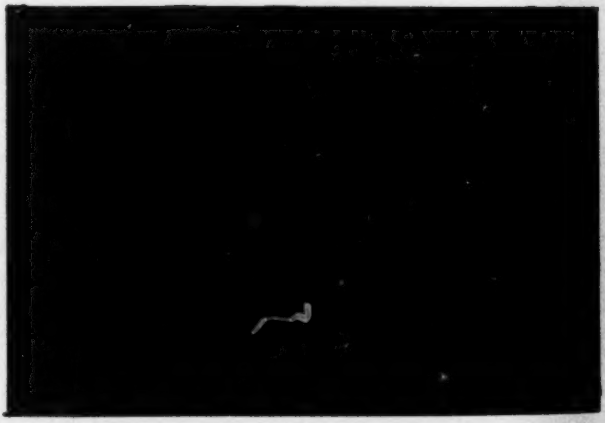
Complainant's Labels.

"Exhibit A."

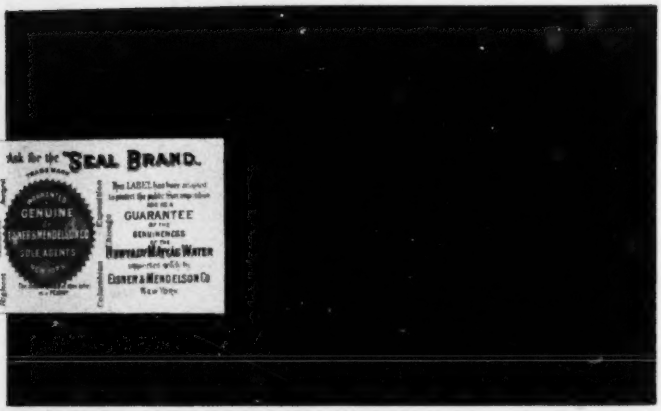


"Exhibit B."

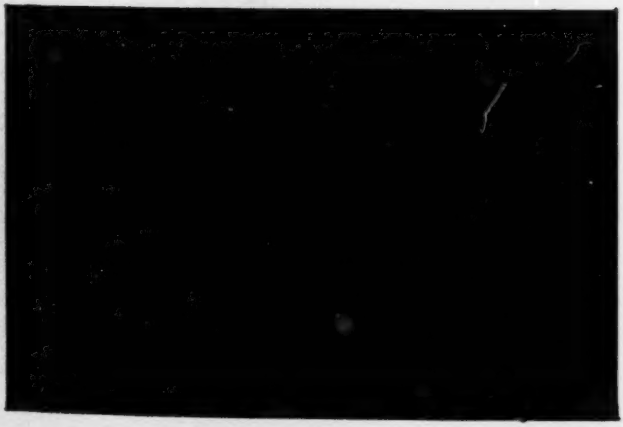


Defendant's Labels.

"Exhibit C."



"Exhibit D."



Supreme Court of the United States.

No. 211.
EMILIE SAXLEHNER, Petitioner,
vs.
THE EISNER & MENDELSON COMPANY.

No. 212.
EMILIE SAXLEHNER, Petitioner,
vs.
SIEGEL-COOPER COMPANY.

No. 213.
EMILIE SAXLEHNER, Petitioner,
vs.
RUDOLPH GIES.

No. 214.
EMILIE SAXLEHNER, Petitioner,
vs.
LOUIS MARQUET.

BRIEF ON BEHALF OF COMPLAINANT AND PETITIONER.

The above entitled cases come to this Court in obedience to writs of *certiorari* issued by this Court to the United States Circuit Court of Appeals for the Second Circuit on March 6, 1899. The first case, in which the Eisner & Mendelson Company is defendant, is the principal case, and there is only one record of evidence for all cases before the Court, as the evidence in the three other cases, Nos. 212, 213 and 214, was by stipulation between counsel taken in one record with the principal case (Record, p. 72). The three additional cases thus joined to the principal case were brought against retail dealers and defended by the Eisner & Mendelson Company, who imported and furnished the commodity complained of to these retailers.

On petition of the complainant there was also a further writ of *certiorari* granted in a case brought against Alexander Nielsen, which is No. 215. This case was not defended by the Eisner & Mendelson Co. and has a separate record of evidence, but as the questions involved in that controversy were to a large extent the same, it was argued and decided at the same time and, as will be shown hereafter, mainly upon the strength of the facts proved in the suit against the Eisner & Mendelson Co. The facts specially applying to that case will be presented in a separate brief.

These cases involve the question of petitioner's exclusive right to the name "*Hunyadi*" as a trademark for Hungarian bitter waters, and her exclusive right to the red and blue label and its characteristic features used on petitioner's well known *Hunyadi Janos* water.

No question was raised in the Courts below concerning complainant's exclusive title, by first adoption, of the words "Hunyadi Janos" as a trademark, which name in the United States has been shortened to "Hunyadi"; and her exclusive title to

the red and blue label showing a division into three panels, with its characteristic features consisting of a medallion picture of the Hungarian hero Hunyadi Janos (John Hunyadi) and the name "Hunyadi Janos" and other descriptive matter contained thereon, and the whole controversy has turned about the question whether complainant's rights have been lost by abandonment or by such laches as would disentitle her to the relief prayed for in the several bills of complaint, which was an injunction against the use of similiar labels bearing inscriptions employing the name "Hunyadi" in some form or other, such as "Hunyadi Matyas," "Hunyadi Laszlo" and others, and an account of damages. For this reason we will only shortly refer to the early history of the Hunyadi Janos Water. In doing so, and hereafter throughout this brief we shall freely refer to the contents of certain ministerial and other official documents from Hungary, as these were made competent evidence of the facts certified to therein by a stipulation entered into between counsel for the respective parties (Record, p. 381).

The Hunyadi Janos Springs.

The Hunyadi Janos Springs of the complainant are situated within the city limits of Budapest in Hungary, in a valley surrounded on all sides by mountains or hills of considerable size, the smallest of them being about five to six hundred feet high, while the valley itself is a plain of considerable extent. The name of this valley is Orsod, and in it are contained only the bitter-water springs owned by the complainant, which cover an extent of more than one hundred acres of land. These springs are thus secluded from the outer world by a natural barrier which surrounds the valley on all sides, and neither the springs themselves, nor the geographical territory in which they are situated, have any connection with any other spring ter-

ritory in or near the City of Budapest (Record, p. 213). The springs number now about 112, and their water, which is of the same or substantially the same chemical composition, is led through a complicated system of pipes which can be separately opened and closed, into large subterranean cisterns from which the water is taken and bottled. Complainant's witness Kalman Saxlehner, a son of the complainant, has explained how the specific gravity of the water in the various springs differs at times owing to atmospheric conditions and how it is regularly measured from time to time so that by admitting the water of this or that spring, or a number of them to the large cistern, the same density of the bottled water is maintained. Every one of these wells is covered with a wooden house, the grounds are kept punctiliously clean, and by employing at all times the most improved sanitary methods for the preservation of the water and its excellent qualities, complainant and her deceased husband and predecessor in business, Andreas Saxlehner, have in the course of now more than thirty-five years built up a reputation for the "Hunyadi Janos" water which has made it a standard medicine prescribed by physicians and used by patients all over the world without question. In the course of these years complainant's business has gradually acquired a yearly output of about six million bottles which are sold all over the world. The books published at different times by the complainant describing the establishment, contain analyses made at different times by the most famous chemists of Europe and a large number of testimonials concerning the excellent quality of the water, coming from all parts of the globe and numbering nearly one thousand (see Complainant's Publications, Nos. 1 and 2, offered on p. 79, Record).

The adoption of the name and label.

The first of these springs was discovered by Andreas Saxlehner in the year 1862 and named by him

"*Hunyadi Spring*" (Complainant's Exhibit No. 18, Record, p. 241). Soon thereafter Saxlehner commenced to bottle the water of this spring and to sell it under the name "*Hunyadi Janos*" (Complainant's Exhibit No. 24, Record, p. 248). As a consequence of this trade the establishment itself also obtained the name of the "Hunyadi Janos Establishment" (Complainant's Exhibit No. 25, Record, p. 249), and the names "Hunyadi" and "Hunyadi Janos" became and remained from that time on inseparably connected with complainant's establishment and business (Complainant's Exhibit No. 26, Record, p. 250).

Andreas Saxlehner was not the first one in Hungary who bottled and sold any of the valuable bitter waters with which Hungary abounds. The waters of several other springs were then already sold in the market and recognized as a valuable commodity, one of them being called "Hildegard" and another being called "Franz Deak". For these waters different bottles and labels were used, wherefore Saxlehner adopted in conjunction with the distinctive name "Hunyadi Janos" also a distinctive label and capsule. A copy of this label is shown on the sheet offered in evidence on page 89 of the record and marked "Complainant's Exhibit Hunyadi Janos Labels Used in the United States."

From 1870 until 1877 Saxlehner exported his Hunyadi Janos water to the United States of America and sold it here in bottles bearing red and white labels of this description, all prominently showing the name "Hunyadi Janos" and the name of Andreas Saxlehner as proprietor of the springs. During this period, as early as 1870 and ever thereafter, the water was known in the United States under the short name of "*Hunyadi Water*" and that name became thoroughly identified with Saxlehner's establishment in the minds of our public. This is testified to by the witness Henry A. Cassebeer, a druggist (Record, pp. 174–176) and cor-

roborated by defendants' witness Paul Scher
dealer in mineral waters, who continued to pur
Saxlehner's water under the red and white
from parties in Europe and sell it in this co
even after the Apollinaris Co. had made its con
with Saxlehner to which we shall hereafter
It is further corroborated by the testimon
numerous physicians, among whom we will re
Dr. William A. Ewing, a practitioner of tw
seven years standing, and to Dr. George B. Fo
who was the Medical Health Commissione
New York City at the time when he test
Dr. Ewing testified that he did not re
ber the time when he was not fa
with the Hunyadi Janos Water; that it
very largely used and prescribed, and tha
usually prescribed it as "Hunyadi Water,"
being its colloquial name. In the 27 years
practice he had never become aware of any
water bearing the name "Hunyadi" or any a
tisement of any other "Hunyadi" waters (Re
pp. 189 to 191).

Dr. Fowler, in answer to the question how
he had known the "Hunyadi Janos" water,
fied that he remembered it distinctly; that he
uated in 1870, and it was used on the market
and he used it as it was used generally by the
fession and has used and prescribed it ever sinc
always thought that Hunyadi water and "Hu
Janos" were synonymous (Record, pp. 149-150

Defendant's witness Eisner knew Saxleh
Hunyadi Water and its labels in this country
1870 (R., p. 361).

We emphasize this year because the Circuit
erroneously came to the conclusion that the
had received the short name "Hunyadi" d
the period of sale by the Appollinaris Com
and could therefore lose it again by the doin
that same company (Record, p. 626). This evid
overlooked the fact that the name had attach

the water long before the company commenced to sell it.

Andreas Saxlehner caused this red and white label to be registered in the Trade-mark Register kept by the Chamber of Commerce and Industry at Budapest as early as the year 1873 (see Complainant's Exhibits Nos. 19, 20 and 22, Record, pp. 243, 244 and 245). It appears from these certificates that previously to this registration no trade-mark was entered in the Trade-mark Register in which the name or title "Hunyady" or "Hunyadi" or "Janos" was contained, and also that the same label was re-registered by the complainant, his widow, in the year 1890, under a law then passed. From the language of these certificates it appears that a trade-mark was registered by Saxlehner, *the title of which* was "Hunyadi Janos," and not that the name "Hunyadi Janos" as such was registered as a trade-mark. Such registration of words or names as trade-marks was not possible in Hungary until the year 1895, when an amendment to the trade-mark law of 1890 was passed, which amendment for the first time permitted the registration of names or words as trade-marks unaccompanied by any pictorial illustration (see "Complainant's Exhibit Hungarian Certificate as to Word Registrations," Record, p. 307). We shall see hereafter that from this lack of statutes covering the matter a mass of confusion and a most unfortunate condition of the law and practice in Hungary arose which has done incalculable harm to Saxlehner, and by reason of which for many years he could get no redress in Hungary against infringers.

Saxlehner's contract with the Apollinaris Company.

In the year 1876 Mr. Steinkopf, a director of the Apollinaris Company, Limited, of London, concluded a contract with Andreas Saxlehner by which the company agreed to purchase a certain quantity yearly and Saxlehner bound himself for the term of

ten years not to sell to anybody else in the territory defined in the contract his "Hunyadi Janos" water, which territory covered Great Britain, the United States and other transmarine countries, excepting Smyrna. This contract was soon thereafter extended for further fifteen years, beginning with the 1st of January, 1886. By a peculiar translation from the German original it is stated that Saxlehner "abandoned" to the Apollinaris Company the exclusive sale of his natural "Hunyadi Janos" bitter water in said territory for such term of years (see Complainant's Exhibit Apollinaris Contract, Record, pp. 237-240). The company became in no manner or way an agent for Saxlehner in the legal sense of the term, but their relations were entirely that of vendor and purchaser, the company agreeing to purchase at least 100,000 bottles yearly until 1878, and at least 150,000 bottles thereafter at a stated price. In addition to this Saxlehner agreed not to fill any orders coming from the territory granted to the company, but to make them over to the company. The sum and substance of this agreement is of a negative character rather, namely, that Saxlehner bound himself not to sell to anybody else in the territory defined in the contract for the period of time provided therein. He could of course not prevent any of his purchasers in Europe from selling the water purchased by them, in the United States of America or any other parts of the contract territory and could not grant any sole rights to the company, but only protect it against direct sales from his establishment to their customers in the United States. There is nothing said in the contract about the label to be employed on the bottles sold to the Apollinaris Company, except that the company's name and address as sole importer should be printed thereon. This was done, but at the same time the same label also distinctly referred to Andreas Saxlehner as the owner of the spring, and the public were thus advised that they bought Saxlehner's water imported here by the Apollinaris Company.

Saxlehner's Red and Blue Label.

Shortly after the making of this contract, it appears that Saxlehner changed the color of his label, which theretofore had been red and white, to red and blue, evidently for the purpose of distinguishing the water bottled by him for sale to the Apollinaris Company from the water sold by him to other parties in Europe, and from this time on, about 1877, all the water shipped to the United States was shipped under this red and blue label. The successive agents of the Apollinaris Company in New York were examined as witnesses for the complainant and testified that from the beginning the water had been commonly bought and sold as "Hunyadi Water," and this continued from 1876 to the expiration of the contract in 1896. This is shown by the testimony of Seymour McCullagh (Record, pp. 122–123) and Robert Pearce (Record, pp. 88–92). Only slight changes were made in this red and blue label indicating the several sub-agents, and since the termination of the contract, by notice from the company to the complainant in March, 1896, the complainant has continued to sell the water under substantially the same red and blue label in this country, having substituted the name of the firm of Andreas Saxlehner as proprietor on the top of the label instead of the name of the company as importer of the water.

The sheet of labels marked "Complainant's Exhibit Hunyadi Janos Labels Used in the United States" shows all the various labels used by the complainant and the Apollinaris Company here.

A glance at this sheet shows slight differences of shading in the red and blue colors of the Hunyadi Janos labels, the centre field sometimes being of a more or less glaring red and in other cases almost brown, while the tints of blue also vary from a rather dark to a very light blue. This has been testified to as being accidental. Attention should be called to it because defendants' main witness, Eisner,

and defendants' counsel made the point that the centre field of defendants' label is of a more brownish color and claim that this distinguishes the two labels sufficiently. Upon comparison the Court will, however, find that some of defendants' labels show substantially the same red centre field, and on the whole the distinction is unsubstantial.

In addition to this red and blue label the complainant since the year 1890 has been in the habit of pasting a narrow strip of blue paper containing the words "Andreas Saxlehner, Budapest, Proprietor of the Spring; Bottled in Hungary" upon that space left between the two ends of the red and blue label, as will appear by an examination of the sheet containing these labels presented to the Court. Attention should be called to this because even in these slight particulars the defendant has closely followed the practice of complainant with reference to the labels and likewise added to its blue and red label a similar longitudinal strip (Record, pp. 542-543; also pp. 399, 400). The inscription on this strip which was used since 1890 on complainant's water further emphasized the fact that it was Saxlehner's water, and not the water of any spring owned by the Apollinaris Company, which was offered to the public in the United States.

THE BLUE AND RED LABEL ALWAYS WAS AND REMAINED THE PROPERTY OF ANDREAS SAXLEHNER AND THE COMPLAINANT. The Court will find that Saxlehner first registered his red and white label in Hungary in 1873, and thereafter from time to time re-registered the same, and also the red and blue label used in the United States. In every instance these labels were registered by and on behalf of Saxlehner, and claimed to be the property of the registrant (Record, pp. 245, 246 and 247). It also appears thereby specifically that the label used by the Apollinaris Company in the United States, and bearing the name of that company as sole exporters of the water, was registered as complainant's label and trade-mark in Budapest in the

year 1890, in accordance with the law passed in that year in Hungary (Record, p. 247).

That Saxlehner claimed this red and blue label to be his property is further evidenced by the fact that when he registered his trade-mark "Hunyadi Janos" in the Patent Office of the United States on September 11, 1877, he described the label upon which it was used, stating that the colors of said label might be either red and white or red and blue, as shown in the accompanying labels, and specifically stated that by thus registering his trade-mark "Hunyadi Janos" he did not mean to curtail, relinquish or waive his right to the exclusive use of the label as a whole (Record, p. 616).

There is no suggestion in any of the papers or in the contract with the Apollinaris Company, that the company had any right or title to the word "Hunyadi" or to the label. Saxlehner sold his water, bottled and labeled by him at Budapest, to the Apollinaris Company, which resold the same in the United States, and whatever right the company had to the use of the label was confined to its use on such water as had been sold to it by Saxlehner with such labels. All its rights ended with the termination of its contract, and complainant thenceforth continued to use the same label, having erased thereon the name of the company as exporters. Upon the red part of the label used in the company's territory there was a warning signed by Andreas Saxlehner that "Imita-
"tion of this water, or of the label, or of the cap-
"sule, will be the subject of legal proceedings at the
"instance of the Apollinaris Company;" but the company, in its contract, did not agree to institute such proceedings.

"Hunyadi" registered by Saxlehner as a trade-mark in the United States Patent Office in 1887.

In order to further protect his trade-mark rights in the United States Saxlehner caused the name

"Hunyadi" to be registered separate from the word "Janos" in the United States Patent Office, as a trade-mark, on April 5, 1887, having made application for such registration November 12, 1886. In the statement accompanying this registration he was again careful to refer to the red and white or red and blue label upon which said trademark was used by him, and to repeat the statement that he did not in anywise intend by said registration to abridge his right to the exclusive use of said label as a whole or to any of its features (Record, pp. 310-311).

Saxlehner's efforts to obtain protection against infringers in Hungary.

There is no evidence in the case that previous to the year 1877 anybody else sold bitter water in Hungary employing the name "Hunyadi" as a part of the name of the water, but previously thereto an attempt had been made by one Ignatius Markus to obtain from the authorities permission to name a spring discovered by him about the year 1872 by the name "Hunyadi Matyas." Ignatius Markus was not the proprietor of this spring, but the lessee of a plot of ground on which he dug or discovered the spring. He made a petition to the Town Council of the City of Buda praying for a license to work this spring under the name "Hunyadi Matyas" (Record, pp. 262-263). Upon this petition the Town Physician, under direction of the Town Council, made a report concerning the quality of the water found, which was unobjectionable, but referred in his report to a protest made by Mr. Saxlehner, the owner of the "Hunyadi Janos" spring, against the use of the name "Hunyadi" by Markus on the ground of a threatened injury to his trade (Record, pp. 263-264). The Town Council thereupon rendered a decision sustaining Saxlehner's protest, in which the fact is stated that even at that time Sax-

lehner's water was generally known abroad and at home under the name of "Hunyadi," and that confusion in trade would arise by the use of the name "Hunyadi Matyas" (Record, pp. 265-266). Marcus appealed from this decision to the Minister of Agriculture, who reversed the decision, holding in substance that the two names "Hunyadi Janos" and "Hunyadi Matyas" were sufficiently distinct, and that it sufficiently appeared that the waters of the springs were substantially of the same quality, and that therefore no damage could ensue by using either one or the other (Record, pp. 266-267). The Minister likewise stated in his decision that the application had nothing to do with any trade-mark protection, because the names were sufficiently different, and because Saxlehner's name and label were not registered. It does not appear that Markus had presented any label to the authorities, nor does it appear that he ever sold any water or made use of the permission granted to him by the Minister of Agriculture. As a matter of fact, he never seems to have obtained the license from the local authorities, which the Minister had decided should not be withheld from him, and it is likewise certified by proper authority that the owner of the ground on which this spring was discovered, one Reso Ensel, never obtained any license to operate such a spring, which would have been a necessary condition for starting such a trade in Hungary (Record, pp. 270-271).

In the year 1876, however, the firm of Mattoni & Wille became the purchasers of this plot and several other adjoining plots containing springs, and in that year registered a separate trade mark and name for each of the six springs which they then acquired, and among these was a trade-mark bearing the name "Hunyadi Matyas" spring. Another of these springs bore the name "Franz Deak." Mattoni & Wille, commencing about 1877, sold in Hungary the waters of these six different springs, claiming in a pamphlet published by them certain specific differ-

ences of composition of the various waters which recommended them for different purposes (Record, pp. 163–164). We shall show hereafter that the water sold under the name "Hunyady Matyas" in the United States by the defendants does not come from the spring named "Hunyady Matyas" by Mattoni & Wille in the year 1877, but from their spring called "Franz Deak," and that this spring was named "Hunyady Matyas No. 2" by the defendant and Mattoni & Wille about the year 1890 for the purpose of enabling the defendant to successfully trade in the United States upon the name and reputation of complainant's "Hunyadi" water.

The decision of the Hungarian Minister of Agriculture rendered in 1873 seems to have encouraged Mattoni & Wille and also several owners of other springs near Budapest to thereafter adopt names for their waters containing the word "Hunyadi" in some connection or other, and also labels which more or less closely imitated the red and white label used by Saxlehner. Saxlehner made in 1887 another attempt to stop the employment of the name "Hunyadi" when applied to a water sold in Hungary and called "Hunyadi Josef" (Record, p. 199). He had repeatedly protested against the use of the name "Hunyadi" by other parties, but was unable to prevent it, and also unable to prevent the use of colorable imitations of his red and white label in Hungary on account of a lack of appropriate statutes upon the subject (Record, pp. 199–201). He died in the year 1889 without having been able to enforce his exclusive rights in Hungary.

It appears that there was a criminal statute in Hungary forbidding the use of counterfeited trade-marks, but the courts and authorities were not yet alive to the fact that piracy of trade-marks by counterfeits is seldom resorted to, but its most dangerous form consists in the use of similar labels, insignia and names. When the complainant took over the business of her pre-

decessor, a statute was passed in Hungary in the year 1890, which contained more stringent provisions and made a prosecution of the several imitators possible, and the complainant at once took advantage of this and instituted a large litigation against all infringers in 1891, to which the witness Kalman Saxlehner has referred. His testimony upon the condition of the law in Hungary was objected to as incompetent, but it appears sufficiently from the context of the decisions against Mattoni & Wille of the years 1894 and 1896, and from the various other decisions of the Hungarian Minister of Commerce against other infringers, which have all been offered in evidence, that the relief granted to the complainant by those decisions could not be had previous to the laws of the years 1890 and 1895. Indeed, in some of these decisions it is set forth that previous to those years some other decision had been made by another Minister (undoubtedly referring to the Markus decision of 1873), which, however, is criticised as not in point, because made by an administrative tribunal in a controversy not involving trade-mark or label rights. This criticism was quite correct because, as we have already shown, the application of Markus was not for the registration of a trade-mark, but for a license to operate a spring and the incidental reference to the name was an *obiter dictum* (see Complainant's Exhibits Hunyadi Matyas Decision of 1894, Record, p. 257; Hunyadi Matyas Decision of 1896, Record, p. 258; Hunyadi Laszlo Decree, Record, p. 276; Uj Hunyadi Decree, Record, p. 294; Hunyadi Lajos Decree, Record, p. 305).

Finally, it also appears by the certificate "Complainant's Exhibit Hungarian Certificate as to Word Registrations" that until the year 1895 neither the complainant nor Andreas Saxlehner could obtain legal protection for the trade-mark or name "Hunyadi" or "Hunyadi Janos" in Hungary when used alone, but that until then protection was given only to pictorial trade-marks (R., p. 307).

It appears from the foregoing that Saxlehner until his death in the year 1889 was not in a position to enforce his rights in Hungary, not by reason of any fault of his own, but on account of the primitive and unsatisfactory condition of the laws of Hungary. While this was the case, he did everything that was in his power to get whatever protection he could obtain by registering and re-registering his labels, both in Hungary and in other countries, and never failed to assert his exclusive rights.

We have already shown above, that in the year 1890 the complainant again registered her various labels, including also the red and blue "Hunyadi Janos" label as then used in the United States, in Hungary, in pursuance of the law passed in 1890, providing for better protection against infringement of trade-marks. Very soon after the statute of 1890 had been passed, the complainant sent a formal notice to Mattoni & Wille that she protested against the use of the label employed by them for their "Hunyadi Matyas" Water (Record, pp. 275–276). This notice was dated on July 16, 1891, and demanded the cancellation of all the trade-marks used by that firm of which complainant complained, and comprising also the label for "Hunyadi Matyas."

Right after this, still in the year 1891, the complainant commenced a suit against the firm of Mattoni & Wille, and against the other infringers of her trade-mark and label, among whom were also the owners of the Hunyadi Laszlo spring whose waters are likewise sold by the defendant Eisner & Mendelson Company and mentioned in the bill of complaint (Record, p. 207). The printed bill of complaint in that suit which has been produced by Kalman Saxlehner comprises some three hundred pages; it was directed against all the infringers of Saxlehner's labels and must have required a stupendous amount of work on the part of Saxlehner's attorney (see Complainant's Exhibit Complaint against Imitators, Record, p. 208). Kalman Saxlehner testified: "After "the notice was sent in 1891 our lawyer at once

"commenced to collect the material and this law "suit was filed. It was a tremendous work; the "bill of complaint, I think, alone was three hun- "dred and some pages and about four or five hun- "dred exhibits. It was directed against all of the "people and owners of other mineral water springs "who used the name Hunyadi. Now, when the "lawsuit was filed, after some time it was rejected "for a technical mistake. Our lawyer took all the "suits against eight or ten people or more than that "together and the Minister asked that every one "should be sued separately and this gave our "lawyer a great deal of work which took "about a year or so until he separated them "and filed each lawsuit or complaint separately "1893" (Record, pp. 207-8). The suit against Mattoni & Wille which was thereupon started separately by Saxlehner's attorney, to cancel the Hunyady Matyas label and other labels used by them, came to a final determination in the year 1894 by a decree in favor of the complainant, pursuant to which Mattoni & Wille's various "Hunyady Matyas" labels and other labels imitating those of Saxlehner were canceled by the Hungarian Minister of Commerce, the highest authority in Hungary in such matters. This decree is dated November 26, 1894 (Record, p. 257).

A similar favorable decree was obtained by complainant in her suit brought against "Compagnie Générale d'eaux Minerales et de Bains de Mer" which furnished to the defendant the Eisner & Mendelson Company the "Hunyadi Laszlo" Water sold by the latter in this country. In consequence of this decree the defendant's Hunyadi Laszlo label was likewise canceled in Hungary (see Complainant's Exhibit Hunyadi Laszlo Decree, Record pp. 276-277). It was rendered May 25, 1894.

The sale of the Hunyadi Laszlo Water was practically stopped by the obtaining of this decree, not only in Hungary but also in the United States, but not so that of the Hunyady Matyas Water. In spite

of the decree of November 26, 1894, Mattoni & Wille still continued to use the name "Hunyady Matyas" separate from the label in Hungary, and exported the water as before to the Eisner & Mendelson Co. with the red and blue labels which were not registered in Hungary.

Another remedial act was, however, passed in Hungary in the year 1895, which provided for the registration of words or names as trade-marks, and complainant at once taking advantage of this, registered her name "Hunyadi" as a word trade-mark, and in the same year instituted another suit against Mattoni & Wille, which came to a decision in 1896. The decree of the Hungarian Minister of Commerce, "Complainant's Exhibit Hunyady Matyas Decision of 1896." (Record, pp. 258-262), was the outcome of this second litigation, and FINALLY DETERMINED FOR AUSTRO-HUNGARY THE RIGHTS OF COMPLAINANT TO THE SOLE USE OF THE NAME "HUNYADI" AS A TRADE-MARK. Similar decisions were rendered in the year 1896 in her favor against the other imitators of her name, and the Court will find an enumeration of these various decisions in Saxlehner's Circular of November, 1896, which was then sent out to the trade in Hungary and elsewhere (Record, pp. 290-293). Among the trade-marks enumerated in this circular is that of "Hunyadi Josef," against which Saxlehner had been unsuccessful in 1887, but succeeded in 1896; also that of "Hunyadi Lajos," which is the water imported by the defendant Alexander Nielsen in the Case No. 716, and also the mark "Uj Hunyadi," registered by the Uj Hunyadi Company, which was a creature of the Apollinaris Company, Limited. The decree against the Uj Hunyadi Company is the longest and most circumstantial of all these decrees, and shows that the Apollinaris Company, through the Uj Hunyadi Company, waged a more bitter fight against complainant than any other of the competing concerns. Every imaginable defense to complainant's claim is discussed at great length in that final decree, which,

together with the other decrees rendered at the same time, ended complainant's fight with the infringers which had practically lasted continuously from the year 1891 until October, 1896.

That these litigations were not the only steps which complainant took during that period in order to establish and protect her rights will be shown hereafter.

The suits of the Apollinaris Company against infringers in the United States in the years 1886-1888.

The company went on in the business of selling the "Hunyadi Janos" water in the United States without a competitor of importance, excepting one Paul Scherer, who imported Saxlehner's "Hunyadi Janos" water under the red and white label from Europe, buying it from parties who had purchased it from Saxlehner. The Apollinaris Company instituted a suit against Scherer to enjoin him on the ground that it had an exclusive right to sell Saxlehner's water in the United States, but its claims could not be substantiated and its suit was dismissed. This suit was decided on March 16, 1886, and the decision is found in Vol. 27, Fed. Rep., pp. 18-22. This decision emphasized the point that by the contract between Saxlehner and the Apollinaris Company no territorial title to the products of the spring was granted. The Court also found that there was no breach of covenant on the part of Saxlehner; but that, on the contrary, he did all that was in his power to carry out the agreement between himself and the Apollinaris Company.

In the same year, however, infringements by the sale of simulated waters came up. The Circuit Court found as follows with reference to this matter:

> "In 1886, Mattoni & Wille, of Budapest, consigned to one Andres, in New York, 121

cases of their Hunyadi Matyas Bitter Water. This firm had bought four springs in Budapest, one of their purchases being the original Markus spring, and in 1877 they registered in Hungary four trade-marks for four several wells, to wit, 'Szcihenyi,' 'Deak,' 'Sz Istvan' and 'Hunyadi Matyas.' Ignatz Ungar & Son became in 1880 the owners of a Budapest spring which they called 'Hunyadi Arpad' and registered the name in Hungary, and in 1886 began to sell the water from it in New York City, through Joseph Ungar as their agent. This water was put up in an imitation of Saxlehner's red and blue labels; the Matyas bearing the words 'Hunyadi-Mathias-Quelle' in small print, was put up in red and white labels. Suits were promptly, and before Andres had an opportunity to sell his lot, commenced in 1886 in the United States Circuit Court for this district by the Apollinaris Company against these agents to enjoin them against the use of the trade name 'Hunyadi' and of the labels, but were withdrawn on the ground of want of jurisdiction, and two suits, one against Andres and the other against Ungar, were brought by the Apollinaris Company in the Supreme Court, in the City of New York. *Ex parte* injunctions were issued in each case in February, 1887, and remained in force until July, 1888, when on application of the defendant in the Ungar case, the injunction in that suit was dissolved, no one appearing in opposition, and soon after the injunction in the Andres suit was dissolved without objection and the suit was voluntarily discontinued.

"An attempt was made by the Eisner & Mendelson Company to show that the Apollinaris Company notified Saxlehner of the pendency of the motion to dissolve the injunction in the Ungar case and his refusal to assist in the opposition, but the offered testimony was merely hearsay and was inadmissible."

Record, pp. 622-623.

The evidence referred to by the Court consisted of translations of portions of alleged letters written by the Apollinaris Company to Saxlehner in the year

1888, which were objected to as incompetent. Thereupon defendants' counsel offered in evidence an affidavit made by a Mr. Prince, manager of the Apollinaris Company in London, in which these letters were referred to. This was also offered in evidence against the objection of complainant's counsel and has been reprinted in full on pages 597–611 Record. The Court will find the testimony and offer objected to on pages 530 to 533 of the Record.

Beyond this attempt there is no evidence in the case whatever that Saxlehner had any knowledge of the proceedings brought by the Apollinaris Company in this country against Andres and Ungar. The suits were not brought in the name of Andreas Saxlehner, but in the name of the Apollinaris Company, and the whole tenor of the bills of complaint in these two cases shows that the Apollinaris Company believed it had a grant of a right from Saxlehner under which it could maintain a suit against infringers at its own instance and for its own benefit (Record, pp. 566–570). The main defense set up by defendant Andres was that his principals in Hungary, to wit, Mattoni & Wille, who had consigned to him the "Hunyadi Matyas" Water for sale, took said water from a spring in Hungary which for "many years prior to 1877 and since then" had been known by the name of "Hunyady Matyas"; that its owner always had as good a right to that name as a trade-mark as the owner of the "Hunyadi Janos" spring, or his assigns or grantees ever had to the use of that name, and that Mattoni & Wille had obtained by royal grant permission to put all their different Hungarian Bitter Waters on the market under the general name of "Ofner Royal Bitter Water," under the condition, however, that they would print upon their labels on bottles which contained waters from said "Hunyady Matyas" spring, the name "Hunyady Matyas" (Record, pp. 572–573).

The papers in the litigation of the Apollinaris Company *vs.* Ungar likewise show that the main de-

fense relied upon by Ungar was the point that Ungar had the right under the laws of Hungary to sell "Hunyadi Arpad" water everywhere under that name. Ungar cited the decision adverse to Saxlehner's claims made by the Minister of Agriculture in 1873, upon the petition of Ignatius Markus and claimed in numerous affidavits that Saxlehner had no right to proceed against or complain of Ungar in Hungary on the ground of any imitation of his trade-mark or label (Record, pp. 578–579). Both defendants therefore relied mainly upon the fact, which at that time could not be contested, that in Hungary it was lawful, because not forbidden, to use the simulating "Hunyady Matyas" and "Hunyadi Arpad" labels and names, and insisted that the owners of these springs should have the right to use the same names and labels anywhere else; in fact this latter contention was certified to by an United States Consul at Budapest (Record, p. 578).

We have above given the reasons for our contention that the affidavit of Prince and the testimony of Haldenstein concerning any alleged correspondence between the Apollinaris Company and Saxlehner in the year 1888 should be excluded from consideration. If for any reason they should deserve consideration, the court will find that in one of these letters the Apollinaris Company suggested to Saxlehner, that in view of his failure to get redress against the "Hunyadi Josef" water in Hungary in the year 1887, a prosecution of his rights in the United States would be attended with very doubtful result. The company said:

> "The recently published decision of the Hungarian Minister of Commerce given against you in your case against Hunyadi Josef confirms us in the opinion which we had formed more than a year ago and mentioned to you in our letter of the 8th March, 1887, that we cannot hope to succeed in preventing the sale of other waters in America under names of which the word 'Hunyadi' forms part. We do not therefore intend to oppose

the dissolution of the injunction" (Record, p. 605).

We therefore maintain that the record of this case either is devoid of any proof that Saxlehner had anything to do with or any knowledge of the suits instituted by the Apollinaris Company in 1886–1888, or that, if it does show knowledge of such suits, he was advised by the company which sold his water in the United States that it saw no possibility of protecting his trade-mark rights in this country in view of the unfortunate condition of the law in Hungary.

Neither the complainant nor her husband were ever in the United States. They resided continuously in Budapest, and had, until 1895, no agent or representative in the United States. Kalman Saxlehner, a son of complainant, first learned of the sale of the imitation Hunyadi waters and their blue and red labels in this country when he came to this country in 1895. He had been active in the business at Budapest since 1888, and since 1893 had been initiated into its matters of importance, but never saw defendants' labels until he came here (Record, pp. 73-75; also 115-117).

The Apollinaris Company schemed to deprive Saxlehner of his trade-mark rights.

In or about the year 1880 the Apollinaris Company registered in England the trade-mark "Hunyadi Janos" in its own name as proprietor and refused to cancel this registration or transfer it to Saxlehner when he discovered this fact about 1883. Saxlehner was compelled to commence a litigation against the Apollinaris Company in England to cause the cancellation of this illegal registration, but such complications followed thereafter that it was as a result of another suit brought by the Vichy Company that finally Saxlehner's mark was restored to him (Record, p. 206). In

1886 or 1887 the Apollinaris Co. purchased a spring of bitter-water in Hungary known as the "Ofen Rakoczy" spring and held this spring for the purpose of bringing its waters into the market under the name of a "New Hunyadi" water at some time when it might find it profitable to end the contract with Saxlehner. In order to gradually transfer the the reputation of the "Hunyadi" water to its own business, it adopted in the year 1887 a small yellow label of diamond shape which it pasted upon the labels of the "Hunyadi Janos" water. This label contained the words: "The diamond is the trade-"mark of the Apollinaris Company, Limited, and "is meant *only* to indicate that mineral waters so "marked are sold by the Apollinaris Company, "Limited."

In itself this label was harmless, but that it was adopted for the purpose of gradually acquiring the benefits of the reputation enjoyed by the Hunyadi water and to serve as a bridge by means of which the reputation could be transferred to the bitter-water of the "Ofen Rakoczy" spring appears from a letter of the company to one of its agents written in 1887, and was fully acknowledged by Mr. Prince in the suit of Mrs. Saxlehner against the Apollinaris Company in England in 1896-7 (Record, pp. 202-205).

In the year 1891 complainant, discovering the use of this diamond label in England, sought to enjoin the Apollinaris Company from its use on the "Hunyadi Janos" water, but failed in this attempt, the English court not finding anything illegal in such use (Record, p. 216).

In the United States the agents of the Apollinaris Company, Charles Graef & Co., had published (without the knowledge or consent of Saxlehner) in the year 1889 a circular in which it stated:

> "The Apollinaris Company, Limited, London, beg to announce that as numerous aperient waters are offered to the public under names of which the word 'Hunyadi' forms a

part, they have now adopted an additional label comprising their registered trade-mark of selection, which consists of a red diamond. This label will henceforth also serve to distinguish the Hungarian aperient water sold by the company from all other aperient waters."

Record, p. 623.

From that time on and until the cancellation of the contract in 1896, the company placed upon the bottles of Hunyadi Janos water, which it sold in this country, the red diamond label and in the year 1893 (again without Saxlehner's knowledge) published a circular through Graef & Co., its agents, as follows:

"Before any Hunyadi water was practically known in the United States, the Apollinaris Company, Limited, of London, widely and successfully introduced the Hunyadi Janos water, the proprietor in Budapest of the springs having entrusted to them, for a term of years, still unexpired, the sole sale of this water in England and in all transmarine places. Hunyadi Janos water having become very popular, quite a number of other waters are now offered for sale, under names of which the word 'Hunyadi' forms part, and in bottles and with labels closely resembling in appearance and color those long used for Hunyadi Janos water."

"The word 'Hunyadi' having become a general name for Hungarian bitter waters, good, bad or indifferent, the Apollinaris Company affixed to the bottles of Hunyadi Janos, the Hungarian bitter water of which they have still the sole sale, a small yellow label with their red diamond, the object of this trade-mark being only to indicate to the public that the bottle so labeled is sold by the Apollinaris Company, Limited."

In March, 1896, when the contract expired, the company endeavored to carry out its scheme, conceived about 1886 or 1887, and suddenly threw upon the market large quantities of bitter water coming

from the "Ofen Rakoczy" spring under the newly given name of "*Apenta, from the Uj Hunyadi Springs at Budapest,*" adding thereto the red diamond sign formerly used by the company on Saxlehner's water. "Uj Hunyadi" means "New Hunyadi." In consequence of this attempt to usurp the right to the name "Hunyadi," complainant brought a suit against the company in the Court of Chancery in England in 1896, and in 1897, after a trial on the merits, obtained a perpetual injunction against the Apollinaris Company forbidding the further use of the name "Hunyadi" upon any but Saxlehner's water. A similar suit was brought by complainant against Charles Graef & Co., the agents of the Apollinaris Company in this country, but that controversy is now at an end, the company having withdrawn the name "Hunyadi" from its labels (Record, pp. 280, 282, also 204, 205).

It also appears that Saxlehner and the Apollinaris Co. were almost constantly in litigation with another in Austria and elsewhere, and their relations were always strained. It is not claimed that complainant was apprised of the issuing of the company's circulars of 1889 and 1893 in the United States, which were evidently a part of Graef & Co.'s scheme to spoil her business for its benefit.

Defendants' labels were designed to deceive the public.

The Circuit Court found as a fact, which was clearly proved, that defendants' manager, Moritz Eisner, "intentionally simulated the Saxlehner "United States label for the purpose of obtaining "by means of the simulation, a part of the good-"will which the Janos water had gained. This "'Matyas Spring No. 2' was not the original "Matyas spring, in regard to which Markus had his "litigation in 1873, but was another spring called "the 'Franz Deak' spring which Mattoni & Wille "bought in 1876 from Michael Ivanyi and wife,

"and was the spring registered in 1877 under the "name 'Deak'" (Record, p. 624).

A comparison of the labels on complainant's bottles and those of the "Hunyadi Matyas" bottles shows the evident intention to imitate the colors and design of the former. Eisner himself had known the "Hunyadi Janos" Water in the United States since 1870 and had sold and handled it and was well acquainted with its blue and red label. He also knew that other Hungarian bitter waters like the "Ofen Rakoczy," the "Franz Josef" and others were sold under other labels not like those of Saxlehner (Record, pp. 359-366).

In the year 1889 the Eisner & Mendelson Company made a contract with Heinrich Mattoni, the owner of the springs, the water of which had been sold by Mattoni & Wille, by which the company obtained the sole agency for the United States and Canada for the sale of the bitter waters which he owned, for the term of twenty years from September 1, 1889. Eisner, who acted for the Eisner & Mendelson Company, saw half a dozen different Mattoni labels, but devised a new one for the American market and imported some twenty thousand bottles in 1889 and 1890 under the name "Royal Hungarian Bitter Water" upon a red and white label (Record, p. 623) As a witness Eisner tried to convey the impression that this contract had been merely a provisional contract made until his company could determine *which spring* it wanted to take hold of, but this contention is in conflict with the contract itself, which was a definite agreement for twenty years, comprising all the various springs of Mattoni & Wille by whatever names they were called. The true reason for the subsequent change of the programme was that upon his return to the United States he found that "Hunyadi Arpad" Water was sold under a blue and red label in the United States and had a large sale on account of the name "Hunyadi" on the bottles and the

blue and red colors of the label, successfully imitating Saxlehner's well known "Hunyadi Janos" Water. By adopting a similar red and blue label, and using the name "Hunyadi Matyas" upon it, he could at once secure a ready sale which the water under the first label had not commanded. The process was simple and he did it. That the water was and remained the same is shown by the analysis on both labels successively used by him, which is the same. This also explains why, in possession of a contract for ALL the springs, he suddenly threw overboard all excepting one, and in the year 1890 leased that spring from Mattoni for a term of years, and called it "Hunyadi Matyas No. 2." The original Hunyadi Matyas Spring was then either dried up or not in operation, and Eisner had to resort to this spring whose waters had formerly been on the market as "Franz Deak," and thereafter as "Mattoni's Royal Hungarian Bitter Water." This was proved by the certificate "Hunyadi Matyas Spring" (Record, p. 273), and also through the evidence of Dr. Endemann, the chemist, who showed that the analysis of defendants' so-called Hunyadi Matyas Water was totally different from the analysis of the original Hunyadi Matyas Spring (Record, pp. 160–165). This was also admitted by the witness Eisner (Record, p. 380). Defendant was unable to produce any sort of license, certificate or decision or document showing when and where this simulated Hunyadi Matyas Spring No. 2 was discovered, licensed or put in operation. He tried to justify the name of this water by showing documents which related to the original Hunyadi Matyas Spring and tried to make the Court believe that this spring was the spring from which defendant obtained its water. Finally, the witness Eisner contended that he adopted this blue and red label for the same water for the purpose of controlling the LABEL for the American market entirely. It is easy to see the true reason for adopting this label in place of that

theretofore used, which was harmless but also ineffective. Dr. Endemann also showed by the analysis of the water and that of the "Franz Deak" water, that the water now sold by the defendants under the name of "Hunyadi Matyas" was identical with that coming from the old "Franz Deak" spring (Record, pp. 165–166), and this was corroborated by the fact that the first agent of Mattoni & Wille received such "Franz Deak" labels from them for the purpose of pasting them on the bottles when he was stopped in the sale of the first lot of "Hunyadi Matyas" labels sent to this country. The analysis on those labels is identical with the analysis of the Franz Deak spring published in Mattoni's Pamphlet of 1878 (Record, p. 293, also pp 272–273). Finally the record evidence from the Hungarian Register also showed that this pretended Hunyadi Matyas No. 2 spring was situated on the plot marked 10335*a*, and no other than the old Franz Deak spring (R. pp. 272 and 273).

In connection with the introduction of this so-called "Hunyadi Matyas" Water in 1890 and thereafter, defendants resorted to the publication of falsified advertisements or certificates relating to the water, and which were probably written originally for the "Franz Deak" spring, but changed the name so as to apply them to the "Hunyadi Matyas" spring. These testimonials, some of which date from the years 1862, 1865, 1868 and 1872, could not possibly have been given for the "Hunyadi Matyas" Water or the "Hunyadi Matyas" spring, because that spring was only discovered and named in 1873. These false testimonials accompanied almost every larger advertisement of the defendant and were reproduced in thousands of copies (Record, pp. 324–325, and pp. 391–394).

To emphasize the falsehood of the matter, defendant published a glaring advertisement, stating in as prominent print as could be procured that its "Hunyadi" water was—

stating also that it had hundreds of other testimonials from the most prominent American and European physicians; that defendants' "Hunyadi Matyas" spring is the oldest of the Hunyadi springs (Record, pp. 406-407); that it had been favorably known on the Continent for more than thirty years past (Record, pp. 404-405). This might have been true if stated of the "Franz Deak" spring, but was stated by defendant as applying to the pretended "Hunyadi Matyas" spring, to show that this was the original "Hunyadi."

Cards of the shape of the label were printed with the tempting blue and red label on one side thereof, and a garbled picture, falsely representing a geographical connection between the "Hunyadi Janos," the "Hunyadi Arpad" and the "Hunyadi Matyas" springs on the other side, together with the untrue analysis of the so called "Hunyadi Matyas" water, and the statement that the latter is the strongest of all Hunyadi waters, while in fact it was much weaker than the others. Large quantities of these misleading statements were circulated among the trade. It is characteristic of the methods of advertising resorted to by defendant, that all publications which have been presented, with hardly any exception, were merely publications in trade papers acquainting wholesale dealers and retail druggists with the fact that the defendant was in a position to furnish the trade with a water having a label so closely similar to that of Saxlehner, that its differences could only be detected upon careful scrutiny, and with a water which by reason of the name "Hunyadi" on the bottle could be palmed off upon an innocent public as and for "Hunyadi" water. No attempt, however, was made to make the water known among the purchasing public. That such advertising could not establish any demand among the purchasing public for "Hunyadi Matyas" water goes without saying. It was merely an invitation

to the unscrupulous to take advantage of the similarity of the name and label. Such practices have been frequently denounced by the Courts.

Pillsbury vs. *Pillsbury-Washburn Flour Mills Co.*, 64 *F. R.*, 841, 849.

Eisner cannot plead ignorance of Saxlehner's prior rights. He knew that Saxlehner was the first who adopted the name "Hunyadi," that he was the first to register his label in Hungary (Record, p. 383), that Saxlehner's water had been in the market of the United States for twenty years as the only "Hunyadi" there known, and that the red and blue label had been used by him for ten years before any imitation appeared in the market. He knew that he was committing a fraud, but trusted that Saxlehner could not reach him. Andres had testified that Mattoni & Wille considered the "Hunyadi Matyas" label as the one which had "the most chance "in the United States, because it bore the "name 'Hunyadi,' and there it was considered to "be very salable, because the name Hunyadi was "known all over the United States." That was in 1886 (Record, p. 222). This opportunity was improved by Eisner by adopting in addition the red and blue label in further imitation of the "Hunyadi Janos" Water.

Saxlehner never intended to abandon the name or label.

The evidence in the case shows that instead of abandoning, Saxlehner asserted his rights wherever he could. When in his first unsuccessful attempt to formally protest in 1873, it was suggested by the Hungarian Minister that his label was not registered, he immediately registered it as a trade-mark, and thereby secured the first registration of any label for bitter waters in Hungary (Record, p, 243). In 1877 he registered the Hunyadi Janos trade-

mark in the United States Patent Office (Record, p. 616).

In 1884 he registered in Hungary the three labels used on the bottles sold by him to the Apollinaris Company (Record, p. 247).

In 1887 he instituted his unsuccessful suit in Hungary against the Hunyadi Josef Water.

In the same year he registered the word "Hunyadi" as his trade-mark in the United States Patent Office.

Upon Saxlehner's death in 1889 the complainant caused his trade-marks to be transferred to her on the registry in Hungary (Record, p. 246).

In 1890 complainant re-registered the three labels used upon the bottles for the Apollinaris Co. (Record, p. 247).

In 1891 complainant notified Mattoni & Wille of her intention to sue and instituted suit against all the infringers in Hungary (Record, pp. 275-276). From 1891 to October 1896, complainant conducted litigations against all the infringing waters in Hungary and during that time, in 1895, seized the first chance which she had in Hungary to register the name "Hunyadi" there as her trade-mark.

During the same time she successfully protested in Germany against Mattoni & Wille's attempted registration of Hunyadi Matyas (Record, p. 211), and tried to prevent the use of the red diamond mark in England, but without success (R., p. 216).

In June, 1896, she had also instituted her suit against the Apollinaris Company in England and obtained a final injunction against the illegal use of the name Hunyadi after a trial upon the merits in February, 1897 (Record, pp. 280-282).

In October, 1896, upon the termination of the Hungarian suits, notice to stop was sent to the defendant the Eisner & Mendelson Company and other infringers in the United States (Record, p. 252), and the present suits were instituted in April, 1897. Previous to that month complainant had instituted several suits against retailers and obtained evidence

of fraudulent sales in this country (Record, pp. 210–211).

There is not one word of consent in the case, nor any act of Andreas Saxlehner or the complainant inconsistent with their claim of exclusive title.

The Apollinaris Company had no authority to abandon any rights of Saxlehner.

The decision of the Circuit Court denying an injunction upon the name Hunyadi was based upon a supposed abandonment of the name Hunyadi by the Apollinaris Company. The Circuit Court found that the Apollinaris Company was never an agent of the owner of the well and that Saxlehner's relations to it were those of seller and buyer, but it continued:

> "*Inasmuch as it was the sole person who had* "*the right to sell the Janos water in this coun-* "*try and to use its trade-mark and to enjoy* "*the good-will of the business, it was in a* "*position in which it could in fact destroy the* "*name and the good-will, if its own interest* "*dictated such a course.*" "*As the name had* "*become in fact a trade name in* 1886, *so,* "*also, it could by affirmation and positive ac-* "*tion cease to be such, and when it had pub-* "*licly become open to use by competitors, the* "*persons who invested their money, in the* "*honest belief that the name was public prop-* "*erty, should have a fair standing in a court* "*of equity. I am obliged to say that by the posi-* "*tive action of the corporation, which alone* "*had the right to the enjoyment of the name* "*in this country, and which had the right to* "*bring suits for its protection, it became,* "*after* 1888, *one which dealers in Hungarian* "*bitter waters could use as a prefix to the* "*other specific name of the respective waters.* "*They could not call their water 'Hunyadi,'* "*but they could use the word as a prefix*" (Record, pp. 626–627).

This reasoning was disapproved by the Circuit Court of Appeals, which held that "Inasmuch as the company was not Saxlehner's agent he cannot fairly be held to be bound by any 'positive action' of their's of which he was not advised" (Record, p. 659). Nor can it be sustained upon the facts. As we have already seen, the company could not prevent other people from selling Saxlehner's Hunyadi Janos Water in this country who had procured it by purchase abroad. Its exclusive claim to the use of the trade-mark could therefore not be substantiated. Nor can it be said that "it solely enjoyed the good-will of the business," because whatever increase of the business there was inured to the profit of Saxlehner also, who likewise suffered from a decrease. There was between them nothing but the relation which very commonly exists among manufacturers and merchants by which a manufacturer agrees to sell his whole product for a time and for a certain territory only through a certain merchant. To the public this makes no difference, as long as the producer's name appears upon the article. Saxlehner's water did not appear on the market as the water of the Apollinaris Company but as Saxlehner's water, sold here by the Apollinaris Company. Whatever was added by the company to the label might be its property, but at no time and in no manner did the company ever acquire any rights of Saxlehner in or to the name or the label. This is not altered by the fact that Saxlehner upon the bottles shipped to the company printed a notice over his signature that "*Imitations of this water or of the label or of the capsule will be the subject of legal proceedings at the instance of the Apollinaris Co., Limited, 19 Regent Street, London.*" This was nothing but a notice to the public that the company would proceed against infringers, but did not give the company any right to sue in Saxlehner's name, or for him, or in his behalf. The company had valuable interests in

the matter, which it undoubtedly would try to protect, and of this intention Saxlehner gave notice on the label. This was, however, no authority to bring suit for him, still less an authority to abandon or compromise his rights or claims. It is hardly necessary to call attention to the fact that, even if some authority could be spelled out of such a notice, a definite and unequivocal authority to abandon or forfeit any rights for another would be required for the purpose of accomplishing any such effect. The company at best was a tenant only and could not grant or abandon any rights of the owner which it did not itself possess. Nothing that it did could exceed the limits of its contract which was the basis of all authority, both as to the time and the essence of its rights. That Saxlehner knew anything of the publications of the company is not claimed in the suit, nor is there any evidence substantiating such knowledge. That he knew of the litigations commenced by the company about 1887 and voluntarily discontinued by the company in 1888 is claimed by the defendant, but not proved by competent evidence.

The Circuit Court, which reluctantly came to the conclusion that the name "Hunyadi" had been lost by abandonment by the "positive assertions" of the Apollinaris Company, evidently was influenced by the circular of 1893, which is shown by the fact that it found such abandonment of the name, but not of the label. If that position was well taken, it would have followed that the abandonment took place in 1893, and not in 1888, as stated in the opinion of the Circuit Court. In the absence of any consent by complainant, however, as we respectfully submit, no rule of law exists which would make these assertions of the company binding upon complainant. That they did not furnish an inducement to defendant to commit the fraud is sufficiently shown by the date of the publication.

The defendant had no reason to presume that Saxlehner intended to abandon anything.

Saxlehner's prior rights and his efforts to prosecute infringers in Hungary were well known to Eisner when the Eisner & Mendelson Co. contrived its scheme to imitate the name and label in 1890. Saxlehner's trade-mark "Hunyadi" was then registered in the United States Patent Office, and the registration contained a reference to the blue and red label used by Saxlehner which had been known to Eisner for many years in this country. Any knowledge of the suits instituted by the Apollinaris Company against Andres and Ungar, from 1886 to 1888, could not convey to Eisner or anybody else information that Saxlehner had brought or authorized those suits, and it plainly appeared therefrom that the Apollinaris Company held only a contract for a term of years. That contract was not recorded, nor were its terms known to Eisner and he had therefore to assume that it might be ended at any time. The defendant company made no attempt to inquire of Saxlehner whether he objected to the use of the proposed name and label, but endeavors to justify its conduct by testimony concerning a conversation between Mendelson, the treasurer of the defendant company, and Steinkopf, the director of the Apollinaris Company in London. The proposed label was not mentioned at that conversation, which turned only about the fact that defendant intended to sell the Hunyadi Matyas Water of which it had obtained control by a lease. Steinkopf stated "that he could have no objection to that, that there were other Hunyadi waters" (Record, p. 455). This conversation can be harmonized with a belief of Steinkopf that his company had no legal remedy in view of the state of the Hungarian laws. It had no reference to the label and would not, even for the Apollinaris Company, be evidence of a voluntary abandonment of any claim to the label.

The other conversation to which defendants refer took place with Haldenstein, an agent of the Apollinaris Company in New York, *after defendants had commenced to use the red and blue Hunyadi Matyas label there*, and it also is of no force as binding Saxlehner. It cannot be claimed to have acted as an inducement to defendants to adopt the name and label, because it took place in 1892, which was two years after they had been adopted (Record, p. 353).

The inquiries which Eisner made in Hungary could only convince him that Saxlehner had tried to enforce his rights, without being able to obtain a relief there, but could not satisfy him that Saxlehner had abandoned anything. Indeed, while he was in Budapest in 1889, he contrived the label for "Mattoni's Royal Hungarian Bitterwater," which employed neither the name "Hunyadi" nor the red and blue color.

It was upon his return to the United States, and when he saw the commercial success of the red and blue Hunyadi Arpad label here, that he made up his mind to try the same kind of a fraud. It was then, in 1890, that he "investigated the matter" and found that the Apollinaris Company (not Saxlehner!) had withdrawn its suit against this label, and with this information he thought he was safe, and substituted for the honest Mattoni label the dishonest red and blue Hunyadi Matyas label. During all this time he never inquired of Saxlehner, whose trade-mark "Hunyadi" was publicly registered in the Patent Office, and whose red and blue label had been known to him for many years, what he would do about it. He knew that the company had only temporary rights, because the company's bill of complaint stated this (R., p. 569). He knew further that the defense relied on by the defendants in the Andres and Ungar litigations was not based upon prior use, but upon the contention that by the law of Hungary their doings were not illegal. With reference to the label, this was not even claimed and concerning its palpable imita-

tion he had nothing to influence him, beside the fact that the Apollinaris Co. had discontinued its proceedings against it. (R p. 387, also p. 418). Mendelson did not mention it in his conversation with Steinkopf in London.

We submit that if this contention did not furnish defendant a complete *legal* defense, it certainly did not entitle him *in equity* to commit a glaring fraud upon complainant.

The proofs further show that, soon after it had embarked upon this business, defendant learned of complainant's litigation in Hungary which was designed to enjoin all the imitating names and labels, including the "Hunyadi Matyas" "Hunyadi Arpad" and "Hunyadi Laszlo" used in that country.

The defendant company had a regular business representative in Berlin, who, according to Eisner's testimony, frequently visited Budapest (Record, pp. 333 and 409 and 410). Eisner denied that he had any knowledge of that suit until about 1895 or 1896, but his own testimony proves that this was not true. He admitted on cross-examination that *Mattoni told him "that Mr. Saxlehner was trying the same thing he tried once before in reference to the Hunyadi trade-marks, and that he did not take any stock in it at all; he treated it very lightly"* (Record, p. 412). Now, it is evident from that conversation that it must have happened previous to March 31, 1894, because at that time Saxlehner had already obtained his first decree against Mattoni & Wille cancelling their white and red Hunyadi Matyas label (R., p. 257). When was it? Eisner testifies that he did not visit Budapest in 1894 and in 1895, but did visit Budapest in 1892 or 1893. It is evident that it must have been at a visit in one of those last mentioned years (Record, p. 400).

Among the letters which the witness reluctantly produced there was also found a letter from Mattoni & Wille, dated September 14, 1893, containing a reference to another previous letter, in which they informed the defendant company that there was

some proceeding before the Minister of Commerce with reference to their trade-marks. That first letter, however, was not produced (R., p. 400). Nor did the witness produce any business correspondence of importance with Mattoni & Wille.

Further, it appears that about November, 1892, the Eisner & Mendelson Company wanted to have also a weaker water, and were informed by Mattoni that he would first have to apply for permission to sell the water of a new well (R., p. 395). Mattoni made the application, stating that the name of the water was to be "Hunyadi Matyas III." He was informed by the Minister of Commerce that no permission was necessary, but was "*warned not to use any trade-mark, name, firm or designation of business that would mislead the public,*" calling his attention to the law of 1890 (R., p. 275). Despite of this warning, and in spite of the litigation against the Hunyadi Matyas label instituted by complainant in 1891, Mattoni and defendant devised another red and blue label for this Hunyadi Matyas No 3 in further imitation of complainant's colors and style of label and used it, until for business reasons that use was given up (R., pp. 395, 397). The correspondence relating to all this has not been produced, although it was repeatedly called for, but it is sufficient that Eisner admits that Mattoni informed him of complainant's suit. Just as he had adjudged for himself, in the first instance, that Saxlehner could not stop him, so he continued to take his chances, making in the meantime as much profit out of the business as he could.

Knowing that such a suit had been commenced, it is impossible to believe that he did not know of its result in 1894. The question *must have been discussed* whether after that decree of March, 1894, the defendant would continue the use of the imitating label, because both the red and white and the red and blue labels of Saxlehner were registered for complainant, and the same principle applied to both. It is probable that defendant was further ad-

vised of Mattoni's attempt to register new labels in 1894 and 1895, and admitted that it knew of the second suit of complainant against Mattoni in 1895 and its final outcome in 1896.

Likewise defendant *must have been informed* in 1894 by the company selling the Hunyadi Laszlo Water to it, of the decree rendered in that year cancelling that label. For this water defendant had no label of its own device, and it ceased to sell the water shortly after that decree (R., p. 277).

At no time, therefore, had the defendant company any right or reason to believe that complainant abandoned her trade-mark rights.

Defendant did not build up a business in good faith nor of any valuable character.

The witness Eisner approximately stated from memory that defendant had spent about $25,000 for advertising "Hunyadi Matyas" water. This amount was grossly over-estimated. Two experts in the advertising business carefully examined every scrap of evidence concerning such advertising and computed its expense. They both agreed that the total cost of defendant's advertising, as testified to by Eisner, could not have exceeded the sum of $2,500 (Record, pp. 153-157; also pp. 169-170). Both witnesses also testified that all the advertisements referred to by Eisner were merely inserted in TRADE papers and not in papers which go to the public. Mr. Elliot stated:

> "*They are not papers that any man would use to create a demand with the public for these goods; they don't belong to the class of publications that any manufacturer would use in order to create a demand among customers —not one of them.*"

Every druggist whom the defendant could reach was put in possession of *a copy of a label* under

which defendant offered this water and of the various false statements by which this water was sought to be connected with the well known "Hunyadi" water of Saxlehner and identified with the same as far as possible. Eisner quite truly characterizes this manner of advertising the "Hunyadi Matyas" water as a bold undertaking (Record, p. 331).

So far from being a justification for defendant, this method of advertising is clearly only an aggravation of the tort committed, because the intent is evident to furnish the trade with a convenient instrument of fraud under the cover of legal sanction of the same in Hungary.

That the large sales of the "Hunyadi Matyas" water were due entirely to the fraudulent label and name, and not to any demand among the public for the water either by reason of its excellency or by defendant's effort to advertise the water among the public, is shown by the fact that the "Hunyadi Lajos" water sold by Nielsen, WHICH WAS NOT ADVERTISED AT ALL, was sold in the same large quantities; that the defendant later on stipulated to sell as much "Hunyadi Arpad" as "Hunyadi Matyas" water (Record, p. 331), and also by the testimony of defendant's witness Paul Scherer.

Scherer testified that water with the name "Æsculap" thereon and a red and white label had been imported from Hungary to a firm in New York on whose hands it remained practically unsalable for four or five years. The water became old and stale, when Scherer finally purchased a large part of the lot, and, on his own responsibility, had a *new label prepared for the same in red and blue colors upon which he printed the name, "Hunyadi Aesculap."* As soon as he put this label upon the water he was able to dispose of the whole lot without the slightest difficulty (Record, pp. 447–9; also 273–4). Specimens of these bottles were offered in evidence as "Complainant's Exhibit Aesculap Bottle," and "Complainant's Exhibit Hunyadi Aesculap Bottle."

We have already shown that this water advertised and sold by defendant as "Hunyadi Matyas" water in the United States did not come from the "Hunyadi Matyas" spring, but from the "Franz Deak" spring, and that defendant either knew this or had good reason to know it, because a spring called "Hunyadi Matyas No. 2" did not exist before it made its second contract with Mattoni & Wille. In addition to this it should be borne in mind that defendant never was the owner of any spring called "Hunyadi Matyas," and that its own rights were only those of a lessee and of a temporary character. It could therefore not build up any trade of permanent value, because Mattoni & Wille might not be willing to prolong the lease.

The name "Hunyadi" has not become a generic name.

The Circuit Court did not and could not from the evidence find that the name "Hunyadi" or "Hunyadi Water" had changed its original meaning into a generic name for Hungarian bitter waters generally. It found among the facts clearly proved that complainant's water "is commonly designated by consumers in the United States as 'Hunyadi Water,'" and drew the inference from this that the other spring owners "could not call their water 'Hunyadi.'"

The Circuit Court of Appeals did not disturb this finding, but based its opinion entirely and solely upon an imputation of laches to complainant which was supposed to make it inequitable to grant her the relief prayed for.

Fifteen physicians, most of whom had practised in New York City for many years and had lived on the very spot where defendant claims to have been openly and publicly selling its water in competition with that of complainant, have testified that "Hunyadi Water" has only one meaning to them,

and that is "Hunyadi Janos"; that they prescribed it for years as such either by written prescription or by oral directions, and in every instance expected that "Hunyadi Janos" would be furnished in answer to such prescription. We refer the Court to the testimony of Dr. Robert McLean Taft (Record, p. 124); Dr. Robert M. Daley (Record, p. 126); Dr. James A. Gardiner (Record, p. 127); Dr. Frank G. Esson (Record, p. 128); Dr. Charles A. Kinch (Record, p. 130); Dr. William A. Ewing (Record, p. 133); Dr. Richard E. Brown (Record, p. 135); Dr. James H. Dew (Record, p. 137); Dr. Henry F. Owsley (Record, p. 142); Dr. Frank Hollister (Record, p. 144); Dr. George B. Fowler (Record, p. 149); Dr. Augustus Caille (Record, p. 151); Dr. Arthur M. Jacobus (Record, p. 171); Dr. Hobart Cheesman (Record, p. 185), and Dr. Henry F. Robinson (Record, p. 187).

Their testimony, as it is here presented, is fairly representative of the knowledge and opinion of the medical profession which prescribes the water. The medical profession either has had no knowledge at all of the fraudulent substitution which has been going on to a considerable degree, or wherever single instances of such substitution have come to its knowledge, has frowned upon it. *Not a single physician has been called by the defendants to testify to any other opinion or belief among the medical practitioners or among the consuming public.*

This same fact is corroborated by a number of other witnesses, grocers, druggists and consumers, among whom are representatives of the well-known firms of Acker, Merrall & Condit, and Park & Tilford. Their testimony is well summed up in the statement of the witness Henry A. Cassebeer, a well-known druggist in New York City, who testifies that it is his belief that when people ask for "Hunyadi" water they invariably want "Hunyadi Janos" (Record, p. 174).

In this connection we will shortly refer the Court to the evidence of the witnesses William B. Higbie

(Rec., p. 81); John R. Agnew (Rec., p. 83); Henry A. Cassebeer (Rec., p. 174); Abram B. Kerley (Rec. p. 183); Oscar Krause (Rec., p. 177); John E. Philips (Rec., p. 226); George B. W. Brown (Rec., p. 230); Maurice Leon (Rec., p. 219).

As an answer to this the defendant has called a few dealers in mineral waters and druggists, who testified in substance that since about 1889 there were several Hunyadis known *in the trade*, distinguished by the various additions to this name. None of these witnesses undertake to testify as to what is known *by the public* under the name "Hunyadi," but they all confine their testimony entirely to the meaning of the word among the trade, namely, the wholesale dealers and those retailers who buy of the wholesalers. Now, it is very plausible that if the wholesaler has several bitter waters bearing the name "Hunyadi," he will inquire which particular Hunyadi is called for and distinguish the different waters by the additional name. But the same would be true of any dealer who even for the period of a few weeks or for one day would be furnished with several such waters. The most respectable of defendant's witnesses, Charles O. Weisz, employed by a large firm, admits that whenever any person asks him for a bottle of genuine Hunyadi, he gives him Janos (R., p. 490.)

The claim made by the retail druggists called as witnesses by defendant is in substance that whenever "Hunyadi" was called for at their store they would inquire which "Hunyadi" was meant, and furnish that which the purchaser demanded, and if the purchaser did not insist upon any particular water, would give him that on which they made the most profit.

This again, even if true, does not establish the proposition that the public used the term "Hunyadi" as a generic term. But the Circuit Court did not believe those professions of honesty, in the light of the overwhelming evidence of fraud in the case.

That the name "Hunyadi" and the red and blue label have not become the common attributes of Hungarian bitter waters during the time while these imitations have been on sale, is sufficiently shown by the fact that during all this time other Hungarian bitter waters, such as the "Franz Josef" Water, the "Victoria" Water, the "Rakoczy Gyorgy" Water, and others, have been sold in this market under their own names and under their own labels not in imitation of Saxlehner's, and have never been called Hunyadi waters (Record, pp. 475, 491). All witnesses for defendant agree that they called "Hunyadi" only those waters which bore that name on the label.

Nor is the claim, assiduously brought forward by the defendant, that the name and label had become descriptive of a certain group of bitter water springs near Budapest, founded upon fact, because some of these imitations, such as the "Hunyadi Lajos" and the "Hunyadi Vilmos," came from springs situated at remote parts of Hungary, and far away from Budapest.

It is natural to presume that a druggist, being called as a witness, will not admit that he has sold an imitation for the genuine article, but the evidence in the case leaves no doubt upon the fact that many of the retail druggists whom defendant has called made such improper use of the name and label. A characteristic instance is the witness Sherman F. Hennessey (Record, p. 469). He was one of those who pretended to always inquire which "Hunyadi" the customer wanted, but the falsity of this was shown by four witnesses, Leon, Kearney, Herling and Machado, whose testimony showed conclusively that at his very store "Hunyadi Matyas" Water was regularly sold without question, when "Hunyadi" was demanded, and even when "Hunyadi Janos" was demanded (Record, pp. 191, 193, 196 and 219).

This simply confirmed the testimony of numerous witnesses called by the complainant as to the fre-

quency of such fraudulent practices. See the testimonyof Tito Toscani (Record, p. 109); William Stempel (Rec., p. 84); Bernhard Osterman (Rec., p. 92); Samuel Ginsberg (Rec., p. 97): Samuel Shulman (Rec.,p. 101); P. L. Focardi (Rec., p. 224); Eugene Eble (Rec., p. 233).

Toscani, who visited about two hundred drug stores on behalf of complainant, found that while in the better class of stores he would invariably get "Hunyadi Janos" water when asking for "Hunyadi," the practice was frequently different in those sections of the towns where the poorer population lived. In such stores he received "Hunyadi Matyas" or "Hunyadi Lajos" water in many instances even when he distinctly called for a bottle of "Hunyadi Janos." The experience of Stempel was very similar.

The defendants Adolph Gies and Louis Marquet, retail druggists, hotly contested the charges made against them, but the Circuit Court became convinced that the evidence against them was true. They and other druggists fell easy victims to the temptation offered by the fraudulent labels of the defendant company. All these waters were not sold as "Matyas" water or as "Lajos" water, but as "Hunyadi" water, and they were sold upon the reputation of the well known "Hunyadi Janos" with an inducement of a lower price.

The infringing waters were undoubtedly sold in large quantities, but there is no convincing evidence that the figures stated in Haldenstein's table were even approximately correct. The manner of his inquiries precluded all kind of verification. Even if honestly made, there is no saying how many such statements in newspapers, &c., were mere duplications. The information was prepared by a hostile witness, was mere hearsay evidence and properly objected to as incompetent (R., p. 539).

Complainant was not guilty of laches.

We will not reiterate the facts found by the Circuit Court on this point, but simply call attention to the fact that previous to 1895 Saxlehner's right to the name "Hunyadi" in this country as an exclusive trade-mark for bitter waters was embarrassed and brought in question by the fact that the owners of other springs in Hungary could not be restrained there from calling their springs by names employing "Hunyadi" as a part, and that this was used as a pretext by imitators in this country to impair Saxlehner's chances of success here. It would in our opinion have been a sufficient excuse for inaction on his part if in this situation he had decided to resort first to the Courts of Hungary to establish his right, as there was plausibility in the contention that, if the waters of a certain spring could be called "Hunyadi Matyas" in Hungary, they could be called "Hunyadi Matyas" in this country. This defense received color of authority partly by the unsatisfactory condition of the Hungarian law and pretended concessions by royal grant to Mattoni & Wille, and also particularly by the treaty between Austro-Hungary and the United States of America of June 1, 1872. By this treaty it was provided that if a trade-mark was abandoned in the home country, it should be considered abandoned in the country of the other contracting party, and the inference was claimed to follow that if there was no trade mark in the home country recognized in the word or label used, no such trade-mark should be recognized in the other country.

The Circuit Court held:

> "In 1886, when substantial competition in the sale of Hunyadi Bitter Waters made its appearance in this country, the name 'Hunyadi' was in fact the established trade mark of the Janos Water. It was prevented from taking that position in Hungary or in continental Europe by the decision of 1873 which

> declared that 'Hunyadi Janos' and 'Hunyadi Matyas' were different names. Whether upon an attack Saxlehner could have then maintained his right to have an exclusive use of the name in this country is not now clear."

The Circuit Court of Appeals in its opinion did not express any dissension from this position, but inasmuch as it charged Saxlehner and complainant with laches commencing with the year 1888, it must have been of opinion that Saxlehner's rights in this country were entirely unhampered, clear and not embarrassed by any doubtful question. While, in substance, we concede and even assert that Saxlehner should have found protection in this country at any time against the imitators of his name and label, it is undeniable that, previous to the time when complainant's rights were fully established and recognized in Hungary, there was considerable embarrassment in the solution of the question, and even jurists of wide experience might have been of a contrary opinion. The opinion of the Circuit Court renders strong evidence of this.

We have been unable to find any reported decision, previous to the year 1890, authoritatively settling the contention in Saxlehner's favor. In the Andres and Ungar litigations, eminent counsel (Bangs, Stetson, Tracy and McVeagh and ex-Governor Edward Salomon), contended that the Hungarian law, being the law of the origin of the water, name and label, settled the point in favor of the defendants. The Apollinaris Company seems to have been greatly impressed with the plausibility of this view, especially as Saxlehner just then failed again to get any recognition of his rights in Hungary in his suit against the Hunyadi Joseph water in 1887.

The decisions in the case of *Kaiserbrauerei Beck & Co.* vs. *Baltz Brewing Co.*, 71 *F. R.*, 695; *and* 74 *F. R.*, 223, have since then settled the law in favor of complainant, and at the present time jurists

would probably agree that Saxlehner was entitled to protection against the Hunyadi Arpad and Hunyadi Matyas labels in 1887 irrespective of any recognition at home. But this was by no means clearly or fully understood at the time. Whatever suggestion there is in the case that Saxlehner knew of these litigations here is contained in Prince's affidavit, who states that the Apollinaris Company informed him that it or its counsel thought his chances of success very doubtful. Under those circumstances can Saxlehner be blamed if he decided to wait, registering in the mean time (1887) his name "Hunyadi" in the Patent Office so as to apprise the public of his exclusive claims to the name?

He had also reason to suppose that the Hungarian authorities, legislature and ministers, would gradually come to recognize the urgent need of further protection of Hungarian trade-marks, on account of the fact that at that time the protection given to the trade-marks of foreigners in Hungary was actually greater and more sweeping than that accorded to the trade-marks of its own citizens (see Complt.'s Exh. Hungarian Certificate as to Word Registrations, R., p. 307).

As soon as these rights were extended to the citizens of his own country, Saxlehner could have registered the name "Hunyadi" in Hungary and then have claimed in America the absolute protection of the treaty of 1872 above referred to. Was he under such circumstances compelled to risk defeat and the entire loss of his name "Hunyadi," in order to retain his right to his trade-mark which was registered as his property in the U. S. Patent Office?

Neither can Saxlehner be charged with laches in not proceeding against the red and blue "Hunyadi Arpad" label which had come into this country in 1886, and was stopped by injunction at the suit of the Apollinaris Company until 1888. If Saxlehner

had brought suit or authorized a suit with a view to obtain an injunction against the *label* merely, he would undoubtedly have been held to have thereby abandoned any exclusive claim to the name "Hunyadi." The name and label were always associated together, and the danger which attended one of them was a sufficient reason not to commence a suit upon the other alone.

Soon after Saxlehner's death, in 1889, complainant obtained relief upon the label by a trade-mark statute passed in Hungary in 1890. As we have shown on page 32 of our brief, she at once took advantage of this statute, registered her labels once more in accordance with its provisions, and early in 1891 gave notice to Mattoni & Wille and the other infringers of her intention to prosecute them. She instituted suit against them all in the year 1891 and carried on a number of litigations through the years 1891, 1892, 1893 and 1894, in the course of which latter year she came out victoriously against every infringer. Right after this, in 1895, she for the first time, by the statute of that year, acquired the right to register the mere name "Hunyadi" as her trade-mark and did so; her enemies did the same, but she instituted suits against them all once more and was finally successful against them all in October, 1896. *These litigations were directed against the very persons who furnished the imitating waters to the defendants*, and the evidence shows that the principal importers had early knowledge of these suits in Hungary. About the same time she also proceeded against Mattoni & Wille in Germany before the Patent Office, and against the Apollinaris Company before the English Court of Chancery in London, and everywhere obtained judicial and final recognition of her trade-mark rights.

Hence, that which is prohibited to defendants in Hungary and elsewhere, is legalized in the United States by the decision below as to labels which can

be applied to the infringing waters in the United States only, and when the Circuit Court of Appeals says in effect that she slept on her rights for nine years, it ignores the difficulty of her position before 1890 and the five years of vigorous contest after 1890.

To charge complainant with laches in not instituting suit in this country at an earlier time, would invoke a new rule of law which has hitherto not been applied by the courts. No one has ever been required by courts of equity to litigate rights which were so embarrassed by the conflicting state of law in the two countries, or where the litigant's position was such that he was not fully advised upon the situation, or there were other sufficient reasons to excuse his inactivity.

In the present case, instead of inactivity complainant has displayed an unusual amount of energy in asserting her rights, and the same is true of her predecessor, Andreas Saxlehner. If they were not successful in Hungary earlier, it was not their fault, but the fault of the Hungarian laws. Moreover, as to these defendants, who claim under Mattoni & Wille, it is clear that there were no laches whatever, for while they only began to infringe here in 1890, she was as early as the summer of 1891, pursuing their principals by suits in Hungary, and tested her exclusive claim to the name and label in litigations which only ended finally in October, 1896.

Under these circumstances a further protest communicated to the defendant company would have been unnecessary and merely formal. The defendant would not have stopped its sales here as long as it was furnished with the water and the infringing labels by Mattoni & Wille, nor had the complainant any reason to expect that such would be the case. Defendant openly defied her here, because Mattoni & Wille openly defied her in Hungary. This is the only ground upon which defendant justified its adop-

tion of the label in 1890. Neither the defendant nor any other infringer in the United States had a right to expect that she would not prosecute them, because she was prosecuting all their principals in Hungary from 1891 until 1896. All those who sold the waters in the United States during that time took their chances and should at least have immediately discontinued the use of the infringing labels as soon as the contest between the principals was finally decided in complainant's favor in Hungary.

We also submit that complainant had a right to seek the support of her claims given to Austro-Hungarian subjects in the United States under the treaty with this country. All necessary steps were taken by Saxlehner in this direction by registering his trade-mark "Hunyadi" in connection with his red and blue label in the Patent Office of the United States in the year 1887, and registering the same label (because the name alone could not then be registered) in the Chamber of Commerce and Industry of Budapest. Such registration was made by him on December 30, 1884, and the red and blue label was reregistered in Budapest on July 14, 1890. Such protection, however, could not accrue to complainant on the name "Hunyadi" until August, 1895, when the Hungarian statute for the first time allowed complainant to register that name independent of any pictorial design as a trade-mark in Hungary, which was then done.

The Circuit Court of Appeals rested its decision solely upon the supposed authority of the case of *Menendez* v. *Holt*, 128 *U. S.*, 514. We do not understand that this decision has changed the law upon the subject as laid down by previous decisions of the Supreme Court and notably in the case of *McLean* v. *Fleming*, 96 *U. S.*, 245. The total loss or forfeiture of trade-mark rights once obtained can, in our opinion, under these cases, not be produced by laches or negligence of the owner, even where they exist, unless the owner allows the word or sign

to fall into public domain, that is, if he allows it to become part of the language of the country, as a descriptive term, which never happened in this case.

In the case of Menendez *v.* Holt, this Court used the following language:

> "*The intentional use of another's trademark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence, then, in the use is not innocent; and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that as the defendant had been allowed to cut down half of the trees upon the complainant's land, he had acquired by that negligence the right to cut down the remainder* (*Attorney-General* v. *Eastlake*, 11 *Hare*, 205); *nor will the issue of an injunction against the infringemnt of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right* (*Fullwood* v. *Fullwood*, 9 *Ch. Div.*, 176). *Acquiescence to avail must be such as to create a new right in the defendant* (*Rogers* v. *Nowill*, 3 *DeG., M. & G.*, 614). *Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license'* (*Duer, J. Amoskeag Mfg. Co.* v. *Spear*, 2 *Sandford* (*N. Y.*), 599; *Julian* v. *Hoosier Drill Co.*, 78 *Indiana*, 408; *Taylor* v. *Carpenter*, 3 *Story*, 458; s. c., 2 *Woodb. & Min.*, 1).

> "*So far as the act complained of is completed, acquiescence may defeat the remedy on*

the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of estoppel could rarely arise."

Again, in the case of *McLean* vs. *Fleming*, 96 U. S., 245, 257, this Court, through Clifford, J., stated:

"*It sufficiently appears that the respondent has been engaged in preparing and selling his pills for more than forty years; that during that period, or more than half of it, he has been using labels and trade marks corresponding more or less to those used by the predecessors of the complainant, some of whom, during all or most of that time, knew what the labels and trade-marks were which were used by the defendant, the evidence to that effect being full and decisive.*

"*Negotiations took place at one time between the respondent and one of the predecessors of the complainant for an interchange of commodities, with a view that both commodities might be sold at each of their respective places of business.*

"*Evidence of a decisive character is exhibited in the record to show that the complainant or his predecessor knew throughout what descriptions of labels and trade-marks the respondent was using, and it does not appear that any objection was ever made, except as heretofore stated and explained. Once the respondent was requested to insert the initials of his Christian name before his sur-name in the label, and it appears that he immediately complied with the request.*
* * *

"*Acquiescence of long standing is proved in this case, and inexcusable laches in seeking redress, which show beyond all doubt that the complainant was not entitled to an account nor to a decree for gains or profits; but infringement having been proven showing that*

the injunction was properly ordered, he is entitled to the costs in the Circuit Court, but the decree for an account and for the supposed gains and profits being erroneous, the respondent, as appellant, is entitled to costs in this Court."

In the recent case decided by this Court of the *Singer Manfg. Co.* vs. *The June Manufg, Co.*, 163 *U. S.*, 169, 186, the Supreme Court stated with approval a passage from De Marafy in his International Dictionary of Industrial Property, as follows:

> *" Abandonment in industrial property is an act by which the public domain originally enters or re enters into the possession of the thing (commercial name, mark or sign), by the will of the legitimate owner. The essential condition to constitute abandonment is, that the one having a right should consent to the disposition. Outside of this there can be no dedication of the right, because there cannot be abandonment in the juridical sense of the word."*

In several other recent cases this Court has discussed the principles applying to the defense of laches, notably in the case of *Galliher* v. *Cadwell*, 145 *U. S.*, 368. In this case the Court summed up the character of the defense of laches in the following language:

> *" The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact, no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or rela-*

tions during this period of delay, it would be an injustice to the latter to permit him to now assert them."

See also *Lawrence Manufacturing Co.* v. *Tennessee Manfg. Co.*, 138 *U. S.*, 537, *p.* 548; *Manhattan Medicine Co.* vs. *Wood*, 4 *Clifford, U. S.*, 461; *Blackwell's Durham Tobacco Co.* v. *McElwee*, 100 *N. C.*, 150; *Lasher* v. *McCreery*, 66 *F. R.*, 834, 840; *Imperial Chemical Co.* v. *Stein*, 69 *F. R.*, 616; *Gillott* vs. *Esterbrook*, 47 *Barb.*, 455; *Cahn* vs. *Gottschalk*, 14 *Daly*, 552.

This Court has exhaustively reviewed the authorities relating to the defense of laches in cases where the defendant was guilty of actual fraud, in the recent decision of *McIntire* vs. *Pryor*, 173 *U. S.*, 38, stating as its conclusion that "*where the fraud is clearly proven, the Court will look with much more indulgence upon any disability under which the plaintiff may labor as excusing his delay.*"

In view of these authorities we say that the defense of LACHES, upon which the Circuit Court of Appeals dismissed the bill in this case, is not sustained by the proofs, and its decision is in conflict with well settled principles. Indeed, the same Court has recently rendered a decision in another case in which its *dictum* is entirely at variance with the principles of its "Hunyadi" decision and in line with the authorities, in a case which involved much stronger merits for the defendant. In its decision in *Republic of France* vs. *Schultz* (not yet reported and submitted in certified copy), the defendant had for 30 years before the commencement of the suit used the name "Vichy" on his bottles of artificial Vichy water, in perfectly good faith and without any attempt to deceive. Soon after suit was brought, he added the word "Artificial." His death prevented the issue of an injunction, but the Court stated in its opinion that in spite of such long use, and in spite of the uni-

versal practice shown by the proofs, the use of the name "Vichy," as the matter stood at the commencement of the suit, *could have been prevented by injunction.*

We are not aware of any rule of law or equity which requires a complainant to sue all infringers upon his rights at the same time; on the contrary, the reasonableness of allowing him to await the outcome of test suits has been frequently recognized by our courts (*Edison Electric Light Co.* v. *Sawyer-Mann Electric Co.*, 53 *F. R.*, 597; *Accumulator Co.* v. *Edison Electric Illuminating Co.*, 63 *F. R.*, 981; *Estes* v. *Leslie*, 27 *F. R.*, 22).

All element of estoppel is eliminated from the case entirely by the fact that defendant did not act in good faith in introducing its water under the fraudulent label and name. No one who is not himself honest in his claims can assert an equitable doctrine in court. This applies to a defendant as well as to a plaintiff (*Brown* vs. *Lake Superior Iron Co.*, 134 U. S., 530). The defendant did not build up a legitimate business in good faith relying upon assertions which the complainant had made or authorized to be made, but took advantage of defects of the law which seemed to shield fraudulent imitators and succeeded in making heavy inroads upon complainant's business by fraudulent devices. There is no evidence in the case whatever that the name "Matyas" or the little red seal label used by the defendant had given an enhanced reputation and market to the "Hunyadi" water; on the contrary, the evidence very clearly shows that the "Hunyadi Matyas" water is sold and always was sold because it bore the name "Hunyadi" and the simulated label.

In the case of *Gilka* v. *Milhalovitch*, the defendant's plea was that for twenty years past they had sold in the open market the devices described in the bill, which fact must have necessarily been known to the plaintiff. *Sage*, District Judge, in delivering the opinion of the Court, said as follows:

> "*But here the only circumstances relied upon to charge the plaintiffs with constructive notice is that they were represented by agents located at the City of New York, nearly eight hundred miles distant from the defendant's place of business. The defendants have been confessedly conducting all these years a spurious business, manufacturing and selling imitation goods, and using labels that they must have known were calculated to deceive and defraud. They are hardly in position to come into court and assert equities growing out of that business against the manufacturers of the genuine article, whose trade mark they have been infringing. It is not a case of innocent use with complainant's knowledge, nor is it a case where it is shown that the complainant had sufficient knowledge to lead him to the fact, and therefore should be deemed conversant.*"
>
> *Gilka* v. *Milhalovitch*, 50 *F. R.*, 427.

Again, in the case of *Sanders* v. *Jacob*, the same point, that a defendant who is not himself honest, cannot plead an estoppel in such a case, was ruled upon by *Judge Thomson* as follows:

> "The question of laches would be a serious one if there were no element of fraud in the case on the part of the defendant. * * * If the defendant had adopted his trade name innocently and had gone on honestly practicing his trade under that name for four years without objection on the part of the plaintiff, and had built up an extensive business under that name, we should say that it would be contrary to the maxims of equity to enjoin him from further practicing under that name at the suit of the plaintiff at this late date. But where the element of fraud supervenes, lapse of time does not purge the defendant's conduct of this taint."
>
> *Sanders* v. *Jacob*, 2 *Western Reporter*, 408.

If the consent of the Apollinaris Company to the dissolution of its injunctions is regarded as an admission that it had no right to enforce (which is the strongest that can be said), this is no ground upon which to base an estoppel. In order to create an estoppel there must be a material representation of a fact. Statements of law are as inoperative by way of estoppel as would statements of an opinion.

Ross vs. *Banta*, 140 *Indiana*, 151.
Akin vs. *Kellogg*, 119 *N. Y.*, 442.
McKeen vs. *Naughton*, 88 *Cal.*, 467.
Brewster vs. *Striker*, 2 *N. Y.*, 19.

"If both parties are equally cognizant of the facts, and one has acted under a mistaken idea of the law, the other party cannot say he has been deceived thereby, and is entitled to the application of the rule, but will be considered as having acted upon his own judgment only."

Holcomb vs. *Boynton*, 151 *Ill.*, 294.

The same was held in *Estis* vs. *Jackson*, 111 *N. C.*, 145; *Cameron* vs. *Cameron*, 95 *Ala.*, 344; *Whitwell* vs *Winslow*, 134 *Mass.*, 343.

Aside from this the very admission of the Apollinaris Company that the law was against it, was induced by the very persons or their principals who now seek to obtain a benefit from it in the nature of an equitable estoppel. This again militates against the principle that where the representation relied on to create an estoppel has been induced by a previous representation by the other party or his agent, no estoppel can arise, and in itself is conclusive against defendant's claim.

Holden vs. *Putnam F. Ins. Co.*, 46 *N. Y.*, 1.

Summary.

We therefore submit that the case establishes fully, and by substantially uncontradicted evidence, the following contentions:

1st. That the complainant had and has an absolute title to her trade-mark "Hunyadi" and to her red and blue label by first adoption and use.

2d. That she is further entitled to protection of the same by reason of the registration of her name "Hunyadi" as a trade-mark in the United States Patent Office, and by the treaty between the United States and Austro-Hungary of the year 1872.

3d. That neither she nor her predecessor, Andreas Saxlehner, ever abandoned this trade-mark and label and never intended to abandon it.

4th. That neither he nor she ever induced the defendant or any infringer in the United States to believe that he or she had abandoned it.

5th. That the Apollinaris Company, Limited, had no power to abandon any rights for complainant or her predecessor.

6th. That neither complainant nor her predecessor in business were at any time guilty of laches, but exerted themselves to maintain their trade-mark rights.

7th. That the name and label used by the defendants were fraudulently contrived for the purpose of enjoying the benefit of the reputation enjoyed by complainant's water.

8th. That neither the name, nor the label, have become generic or public property.

9th. That complainant has unjustly suffered from an unfortunate condition of the law in Hungary which was taken advantage of by defendants in an unconscionable manner.

10th. That the acts of the defendants are a fraud not only upon complainant, but also upon the public.

11th. That there exists no reason either in law or in equity why the complainant should not have the same relief in this country which is accorded to her in all other civilized countries.

Defendants' seal brand label does not excuse the fraud.

Upon this point the Circuit Court, as we respectfully submit, fell into an error. If it was the defendants' intention to palm off the water as Saxlehner's "Hunyadi Janos" water, as the Circuit Court found to be proved, it cannot be assumed that the defendants changed this intention by afterwards adding to the label the small "seal brand" which did not entirely or for the greater part cover up the original label, but left it exposed to the eye as before, with the exception of part of one side of the bottle. Whenever bottles of this kind stand in a show-window or upon the shelves of a store, this additional seal label may not be visible to the eye at all. The proofs in the case show very clearly that the fraudulent substitution which is going on with the "Hunyadi Matyas" water is practised with this very water which bears the seal label, showing therefore beyond a question that the seal label in fact does not assist in preventing deception. All this proof of deception, of which the case is full, with very few exceptions, refers to bottles bearing this very label, as defendants have pasted it upon every

one of their "Hunyadi Matyas" bottles for several years past.

The intention of defendant company in adopting this additional label apparently was not to differentiate from, but rather to further imitate complainant's label, which at that time was used by the Apollinaris Company with the additional red diamond label. In the same manner the defendant company followed the change made in the label of Saxlehner in 1890, by the addition of a blue strip between the ends of the label (R., pp. 542-3) by soon thereafter pasting a similar strip in the same place. (R., pp. 399-400). The Circuit Court of Appeals expressed at the argument its disapproval of the position taken by Judge Shipman upon the seal brand label and cut short any further argument on the same with the statement that in its opinion the seal brand label would not exempt the red and blue "Hunyadi Matyas" label from the charge of infringement. Its opinion as finally rendered made any mention of this label unnecessary. Neither the excuse that the name "Hunyadi" is solely used as a prefix, nor that the "Seal Brand" label was adopted to differentiate, is entitled to any consideration. If such excuses were usually listened to in trade-mark cases, imitators would have a very easy and wide course to steer without punishment.

Hutchinson v. *Covert*, 51 *F. R.*, 832; *G. G. White Co.* vs. *Miller*, 50 *F. R.*, 277; *Dunbar* vs. *Glenn*, 42 *Wisc.*, 118; *Lever* vs. *Goodwin*, 36 *Chan. Div.*, 1.

Complainant is entitled to an accounting of the damages and profits besides an injunction.

Defendant's infringement dates from the time of its incorporation in 1893. Previous to that and since

1890 its predecessor had carried on a similar business, but that predecessor is not a party to the suit, having been dissolved. For that reason complainant can obtain relief by way of an accounting from the defendant company only since 1893.

Peremptory notice threatening suit was given to defendant company in the fall of 1896, and this suit commenced a few months thereafter. Since then the defendant has in no way changed its labels or mode of advertising, but has openly defied the complainant and invited a difficult and lengthy litigation.

Although as a rule the want of knowledge of complainant's exclusive claims is not a defense to a claim for damages (*Colman* v. *Crump*, 70 *N. Y.*, 573; *Dale* v. *Smithson*, 12 *Abb.*, 237), such want of any intention to commit a fraud may often bear strongly upon the question whether an account of damages or profits should be decreed or not. This is, however, quite different where, as in the present case, defendants' doings leave no doubt that the adoption of their second label was a deliberate attempt to steal complainant's trade under cover of an alleged foreign protection, and this manner of sale was aggravated by continued false representations. Where such an intention is manifest, the Courts have never hesitated to decree an account of profits and damages even after a delay of many years in enforcing plaintiff's rights. A leading case of this kind was decided by the late Mr. Justice Blatchford when still on the bench of the Circuit Court (*Collins* v. *Oliver Ames & Sons Corporation*, 20 *Blatchf.*, 542). In this case it was found that the object of Oliver Ames & Sons in putting the stamp "Collins & Co." on their shovels was to avail themselves of the reputation and market created by the plaintiff for its articles, and while it appeared that defendant continued to do a large business in such shovels for about twenty-five years, the complainant was held entitled to a perpetual injunc-

tion and an account of profits and damages. This case has been frequently cited approvingly, and presents a far stronger case for the defendants than the present litigation (see *Estes* v. *Leslie*, 27 *F. R.*, 22; *Celluloid Manfg. Co.* v. *Read*, 47 *F. R.*, 712; *Funke* v. *Dreyfus*, 34 *Louisania Annals*, 80; *Fullwood* v. *Fullwood*, 9 *Ch. Div.*, 176; *McLean* v. *Fleming*, *above cited*).

The point was argued below by defendants that, until the expiration of its contract in March, 1896, the Apollinaris Company, Limited, was the only party entitled to sell in this market and therefore the only party whose trade could be injured by defendants' infringement. This argument may go to the measure of damages, but not to the principle of awarding damages. Complainant's trade suffered a diminution by every simulating bottle substituted by the defendant, and her trade suffered undoubtedly largely by reason of defendants' sales. It may be that the amount of profit which she would have made by the enhanced quantity will not be the same as if she had sold the bottles directly in this market, but she certainly lost as much again as she would have made under her contract with the Apollinaris Company. We see no reason why she should not recover from the defendant company the damages which she has suffered at its hands since 1893.

In conclusion

we urge upon this Court that by the decisions of the Courts below grave injustice has been done to this complainant. The situation created by the decision of the Circuit Court of Appeals is hard to bear. If it is to be the law of this country henceforth that by such imputation of laches of a commission house selling the product, the owner of the trade-mark might lose his property and right in the trade-mark against his will and without his knowledge and in

spite of his continued efforts to sustain his rights, demands will be made upon the owners of trademarks which are unusual and not understood by the public. If the unfortunate decision of the Court below should be sustained, the complainant might as well leave the market of this country to the unscrupulous imitators of her name and label and confine her efforts to the rest of the world where her rights are recognized and respected. She cannot hope to supplant the name "Hunyadi" as the name of her water by another name, nor is it to be expected that the public will ever give up demanding "Hunyadi" and lay stress on the "Janos," which for nearly thirty years past has been slighted as unimportant. But this will mean the destruction of a business built up during a lifetime and representing hundreds of thousands of dollars, and it will mean that the public of this country is to be delivered over to the hands of those who always stands ready to prey upon the unwary. There would be no reason why everybody else might not use the same name and label, and instead of two or three imitations as exist now, we may have twenty or thirty within a short space of time Nobody could tell any more from what spring or well the water offered under that name might come, and nobody could complain if he received for "Hunyadi" Water a water of entirely different origin, description, quality, and perhaps of no medicinal qualities at all. The decision below sanctions the perpetration and continuation of a pronounced fraud. It, in effect, licenses everybody who wants to reap an unjust gain by a fraudulent imitation of the well known dress and popular name of the "Hunyadi Janos' Water in this country to do so, and invites all unscrupulous persons to take advantage of the situation.

We submit that this decision, which was rendered by two Justices of the Court, the third being disqualified, having adjudged the cases below, is

opposed to the familiar doctrine of equity, that laches of the owner of a trade mark in seeking relief is no defense to the issue of an injunction forbidding the further perpetration of a fraud upon the public and upon the complainant; and that it is opposed to the law and to the undisputed facts of the case, and is so manifestly against the established rules of equity that it should be reversed.

Respectfully submitted,

JOHN G. JOHNSON,
ARTHUR V. BRIESEN,
ANTONIO KNAUTH,
Of Counsel for Petitioner and Appellant.

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

SIEGEL-COOPER COMPANY,
Defendant-Appellee.

The bill of complaint in this case charged the defendant generally with unlawfully selling bitter-water under labels simulating Saxlehner's blue and red label and under the name "Hunyadi." There was no charge of any intentional fraud. The answer was substantially the same as that of the Eisner & Mendelson Company, and the case was defended by the same counsel and the same record of proofs presented.

Proof of sale of a bottle of "Hunyady Matyas" water with the red and blue label and of a bottle of "Hunyady Lajos" water with a similar label was furnished by complainant's witness William Stempel. These bottles were sold on January 15, 1897, when defendant's saleswoman told Stempel that the "Janos" was the genuine, but the "Matyas" water was just as good, but cheaper (Record, p. 85). The "Hunyady Matyas" water purchased by Stempel was that form which has a large number 3 on the label and purports to be a weaker water by the analysis on the bottle.

Further proof of infringement was furnished by the witness Toscani. He purchased on January 22, 1897, similar bottles of "Hunyady Matyas" and "Hunyady Lajos" water, the company having displayed signs with the inscription "Hunyadi Water" (Record, p. 112).

A similar advertisement was published by the defendant in March, 1898, and complainant's witness Eugene Eble went to its store to inquire what they advertised by publishing "Hunyadi Water, 14 cents." He found that this advertisement related to the "Hunyady Matyas" water. The saleswoman produced a bottle of "Hunyadi Janos" water when he asked for a bottle of "Hunyadi Water" and also a bottle of "Hunyady Matyas" water. "I asked her "which was the genuine Hunyadi water and she "said that the one was bottled in this country and "the other in Europe: that they were both from "the same source." Witness purchased a bottle of each, and was charged twenty-five cents for the "Hunyadi Janos" and seventeen cents for the "Hunyady Matyas" (Record, pp. 233-6, and page 294).

This evidence was amply sufficient to prove infringment (*Stetson* vs. *Brennan*, 21 *App. Div.* (*N. Y.*), 554). These charges are not denied by the defendant Siegel-Cooper Company.

Objection was made by defendant's counsel to the evidence of Toscani and Eble that it related to transactions which happened after the bringing of the suit, which is not the case with reference to the purchases testified to by Toscani; but even as to the testimony of Eble we submit that it was competent and proper, because in suits of this kind it is always material to ascertain how a defendant has conducted himself with reference to the matter of infringment and how the infringment has continued, and upon that ground evidence of such further acts of sale by defendant is usually received by the courts.

We do not mean to charge the shop-girl with an intentional fraud. She probably drew the same conclusions which any honest person would draw from the identity of the name and label—that the waters came from the same spring; but the constructive fraud in law is clear. And more than that—the published advertisements of "Hunyadi Water,"

not Hunyady Matyas, clearly showed that the defendant intentionally used the reputation of complainant's water to attract customers to its store, to sell them the imitation for less than the genuine and in place of the genuine.

The Circuit Court dismissed this case, without costs to either party, saying:

> "There is no substantial evidence of fraudulent conduct on the part of the Siegel-Cooper Company, and the bill is dismissed, without costs" (Record, p. 628).

A final decree dismissing the bill was entered (Record, p. 631), and the petition of appeal and assignment of errors to the Circuit Court of Appeals are found on pages 644 and 642 of the Record.

The opinion of the Circuit Court of Appeals does not mention this case, but upon it a decree was entered affirming the decree of the Circuit Court as to the name "Hunyadi," but modifying it so as to dismiss the bill as to the red and blue label, with costs of the appeal to the defendant (Record, pp. 660, 661). It was undoubtedly the intention of the Circuit Court of Appeals by this decree to sustain the decree of dismissal entered in the Circuit Court *in toto*. This was its practical effect.

The appellant's assignment of errors filed in the Circuit Court of Appeals upon appeal from the decree of the Circuit Court, contained the following:

1st. That the Court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the Hunyadi Janos wells of the complainant.

2d. That the Court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the complainant.

3d. That the Court erred in refusing an account of the profits and damages as prayed for in the bill of complaint.

4th. That the Court erred in holding that the trade-mark or name "Hunyadi" of the complainant had been abandoned.

5th. That the Court erred in holding that the trade-mark or name "Hunyadi" of the complainant had been abandoned by her or by any person or party acting for or representing or authorized to act for her or her predecessor in interest, Andreas Saxlehner.

6th. That the Court erred in not granting the complainant the costs of the suit.

7th. That the Court erred in so far as it failed and refused to grant the complainant the relief demanded by the bill and each and every part thereof (Record, pp. 642, 643).

The principal questions relating to the controversy, having been fully discussed in our principal brief in the case against the importers, the Eisner & Mendelson Company, and so far as the "Hunyady Lajos" water sold by this defendant is concerned, in our brief against the importer of this water, Alexander Nielsen, we will confine ourselves to those points which are not treated in those briefs and are relevant to the controversy against this defendant only.

If we are right in our contentions, the complainant had established an exclusive right to the name "Hunyadi" and to the name "Hunyadi Janos" as a trade-mark for bitter water, and likewise an exclusive right to the use of her red and blue label bearing the medallion portrait and general characteristics as to print and arrangement of designs.

It is not claimed by this defendant, or at least,

there is no proof offered, that this defendant had sold the infringing articles for a long time, or was acquainted with the former litigations or with the circulars of the Apollinaris Company. The question of *laches* or *equitable estoppel* is therefore eliminated from this case, unless these defenses have been established in the suits against the importers.

It is also not questioned that the defendant advertised "Hunyadi" without distinguishing epitheton, and then sold to the purchasers the cheaper imitation. By each sale of the imitation it supplanted a sale of the genuine water and caused direct damage to complainant. No proof has been offered in this or any other case that the word "Hunyadi" when used alone did not at all times refer to complainant's water *in the minds of the public*. That it always did, and still does, have that meaning, is overwhelmingly shown by the proofs. Under these circumstances, even if this defendant was not guilty of an *actual* fraud, it committed a constructive fraud with every act of sale, for which it should account to the complainant.

Proof of fraudulent intent is not necessary to make out a case of infringement where the infringement itself is clear. The injury is neither greater nor less by the knowledge of the defendant. The infringement of defendant is an invasion of plaintiff's right of property, and as such entitles plaintiff to relief.

McLean v. *Fleming, supra.*
Coleman v. *Crump*, 70 *N. Y.*, 573.
Blackwell v. *Wright*, 73 *N. C.*, 310.

The "Hunyady Matyas" water sold by this defendant was sold under the same labels described in the case against the principal importer, and the "Hunyady Lajos" water is the same as more fully treated in the case No. 716 against defendant Alexander Nielsen. Both by the color and arrangement of that label and by the use of the name "Hunyady Lajos" thereon the complainant's rights have been

invaded. The bottles bearing these several labels were sold at greatly reduced prices, aggravating the injury to complainant's business. All this was done after the defendant had received a formal notice advising it of complainant's exclusive claims and of its intention to sue infringers, which was served upon the Siegel-Cooper Company in October, 1896 (Record, p. 107, also p. 252).

A defendant who, after receiving notice of complainant's rights, defies them and continues to infringe, should not be heard to say that his acts before such notice were innocent. Furthermore, the registration of Saxlehner's trade-mark in the Patent Office was notice to all of his exclusive rights. The defendant has not come forward to testify that it had no such knowledge and acted innocently, and therefore all the presumptions are against it and are not disproved.

The present case, therefore, is not one in which the defendant invested his money in the infringing article in the honest belief that complainant had no claim or rights in the matter, but is without defense at law and without excuse in equity. The proof of infringment being clear and complete and complainant's title having been amply shown, she was entitled to a decree in accordance with the prayer of her bill of complaint.

Upon these grounds we respectfully pray that the decree of the Circuit Court of Appeals be reversed; that the Circuit Court be instructed to enter a decree in favor of complainant in accordance with the prayer of the bill of complaint, and that complainant be awarded her costs in this court and in the courts below.

Respectfully submitted,

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Of Counsel for Petitioner and Appellant.

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

RUDOLPH GIES,
Defendant-Appellee.

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

LOUIS MARQUET,
Defendant-Appellee.

These two cases are entirely similar and were similarly disposed of by the Circuit Court. They were brought against retailers for unlawful sale of the imitating waters under the name and the label of the "Hunyady Matyas" water furnished by the Eisner & Mendelson Company. The Circuit Court found as a matter of fact that the defendants Rudolph Gies and Louis Marquet had severally palmed off the "Hunyady Matyas" water *as and for "Hunyadi Janos" water*, and granted an injunction against such fraudulent acts, but refused to grant an injunction against the use of the name "Hunyady Matyas" or against the use of the red and blue labels under which that water was sold. Holding that these fraudulent sales "were probably not large enough to justify the expense of taking an account," the Court denied an account of damages or costs.

The decrees which were entered in these two cases in the Circuit Court are found on pages 631 and 632 of the Record. Complainant's petitions of appeals to the Circuit Court of Appeals and assignments of errors are found on pages 646 and 649 in the case against Gies, and on pages 651 and 654 in the case relating to Marquet. The decrees entered upon the decision of the Circuit Court of Appeals are found on pages 661 and 662.

By these decrees the decree of the Circuit Court was "affirmed as to the name Hunyadi; but modified so as to dismiss the bill as to the red and blue label, with costs of this appeal to defendant" (R., pp. 661 and 662). What was meant by these decrees is not clear, as the Circuit Court had not enjoined the use of any labels, but enjoined only the committing of fraudulent sales. For the purposes of this appeal, however, this is immaterial, as the intention of the Circuit Court of Appeals clearly was to deny the complainant any relief on account of the imitation of her label and her trade-mark "Hunyadi"; and this was the effect of its decree.

The finding of fact of the Circuit Court with reference to these fraudulent sales was fully supported by the evidence, and as the defendants did not appeal from the decrees against them is not open to question.

Chittenden vs. *Brewster*, 2 *Wall.*, 191, 196.
The Quickstep, 9 *Wall.*, 665, 672.

The evidence brought against these defendants also proved very clearly that the red seal label adopted by the Eisner & Mendelson Company was used by retailers to pass off the water as the red diamond brand of Hunyadi, thus assisting in the imposition.

Complainant's witness Shulman demanded a bottle of "Hunyadi Janos, Red Diamond," and received a

bottle of "Hunyady Matyas" with the red seal brand of the Eisner & Mendelson Company (Record, p. 103). Complainant's witness Osterman had exactly the same experience at the store of Gies, also demanding a bottle of "Hunyadi, Red Diamond," receiving a bottle of "Hunyady Matyas" with the red seal brand (Record, p. 92).

P. L. Focardi also received a bottle of "Hunyady Matyas" water with the red seal label at Gies' store in December, 1896, when he demanded a bottle of the red diamond brand of "Hunyadi" water (Record, p. 224).

The evidence of infringement in the case against Louis Marquet is furnished by the witnesses Samuel Ginsburg (Record, p. 97), and Samuel Shulman (Record, p. 101). It is of the same nature as the evidence against Gies.

All these sales were made after these defendants had received notice from complainant's attorneys of complainant's rights and claims and intention to sue (Record, p. 107).

The defendants, beyond denying the charge of fraud, offered no defense except such as was made by the Eisner & Mendelson Company in the principal case. They did not claim to have had any knowledge of the prior history of "Hunyadi," but continued the sale of the imitation upon receipt of the guarantee circular issued by the importer.

It is perfectly plain that they sold the infringing waters because they could be had more cheaply than the genuine water, and that they sold this infringing water at the same price at which the genuine "Hunyadi" water was sold to the public, thus making an enhanced profit on the article, in selling it not only on the reputation of the "Hunyadi Janos" water, but directly as and for "Hunyadi Janos" water, which was demanded.

The evidence relating to these two defendants, above referred to, furnishes complete proof of the fraudulent designs of the originators of the imitat-

ing labels and the success with which their scheme of fraud was carried out by unscrupulous retailers. The importers advertised to the *trade* (and to the trade only) that they furnished a water which, by means of the similar label and the name "Hunyady Matyas," could be palmed off upon the public as the "*Hunyadi*" water of the complainant, and the low price charged for it tempted the retailer and undermined his moral convictions. When the Apollinaris Company adopted a red diamond to distingush its genuine water from the imitations, the imitator adopted a red seal so that the druggist could say, "One is the red diamond brand and the other the red seal brand of Hunyadi, but they are both Hunyadi and equally genuine." Finally, when every druggist was personally informed of complainant's rights and claims, the retailers defied her under written guaranty of the importer and continued to impose upon the public in the expectation that the importer (which assumed the defense of these suits) would see them safely out of it.

It is in this manner that the water of the "*Franz Deak*" spring, which had no market in this country, has been sold to uninformed consumers as the complainant's "Hunyadi water," and that the enormous sums spent by the complainant for the advertisement and general introduction of her commodity have been made to enrich the perpetrators of the fraud. We cannot describe the nature of the scheme better than by quoting the words of Jenkins, *C. J.*, from the opinion of the Circuit Court of Appeals in Pillsbury *vs.* Pillsbury-Washburn Flour Mills Co. (64 F. R., 841, 849), where he says:

"*They sell their goods with the false and simulated brand upon them to wholesale and retail dealers at a price below that for which the genuine product of the Pillsbury Mills can be purchased by them. They disclose to the retail dealer their mode of procedure and their object. They appeal to the greed of their*

customers to purchase an inferior quality of flour thus falsely branded with the name of a superior article, that the dealers may palm it off as the genuine article. No ingenuity could devise a more effectual way to pirate a good-will. In the large, bold displayed words, 'Pillsbury's Best' and 'Pillsbury's Best XXXX.,' they addressed the general public. In their dealings with middlemen they declare the truth, making them accomplices in the fraud for their share of the profit. True representations in aid of false ones, but aggravate the fraud."

The assignments of error filed in the Circuit Court of Appeals from the decrees of the Circuit Court in these two cases, and principally relied upon, were the following:

1st. That the Court erred in refusing to grant an injunction against the defendant enjoining him from the use of the name "Hunyadi" upon bitter water not coming from the Hunyadi Janos wells of the complainant.

3d. That the Court erred in refusing an injunction enjoining the defendant from the use of the name "Hunyady Matyas" upon such bitter water.

4th. That the Court erred in refusing to grant an injunction enjoining the defendant from the use of the red and blue Hunyady Matyas label when used in connection with the Seal Brand label of the Eisner & Mendelson Company.

5th. That the Court erred in refusing an account of the profits and damages as prayed for in the bill of complaint.

6th. That the Court erred in holding that the trade mark or name "Hunyadi" of the complainant had been abandoned.

10. That the Court erred in not granting the complainant the costs of the suit.

Record, pp. 646 and 647, and 651 and 652.

All the matters relating to these several assignments of error have been fully treated in our principal brief, excepting the question of an accounting and costs in the present cases against the defendants Marquet and Gies. If, as we respectfully submit, the decrees of the Circuit Court and Circuit Court of Appeals in these cases were wrong, complainant was undoubtedly entitled not only to the injunction prayed for in her bill of complaint in its fullest sense, comprising both the name "Hunyadi" alone or in any combination whatever, and also the red and blue label, whether used with or without the "Red Seal" of the Eisner & Mendelson Company, but was also entitled to an accounting of damages and the costs of the suits against these two defendants. Both defendants were acquainted with complainant's trade mark and label, had notice of complainant's exclusive claims by the fact of her registration of trade-mark in the United States Patent Office, and having been shown to have committed an actual fraud, are estopped from claiming that they acted with innocent purpose in the sale of the imitating water. Common honesty was sufficient to tell them that a label, which was so manifestly designed in color and general appearance, and in the use of the name "Hunyadi" in imitation of complainant's "Hunyadi Janos" water, could not be lawful. Their persistence, after being directly notified of complainant's claims, shows them to have acted with evil intent throughout. Their gains by the sale of the imitating water have been unjust and fraudulent, for which they should account to the complainant in damages.

It is for these reasons that we ask a reversal of the decree of the Circuit Court of Appeals, with

costs, in all Courts, and with instructions to the Circuit Court to enter decrees in these two cases in accordance with the prayer of complainant's bills of complaint in the same.

Respectfully submitted,

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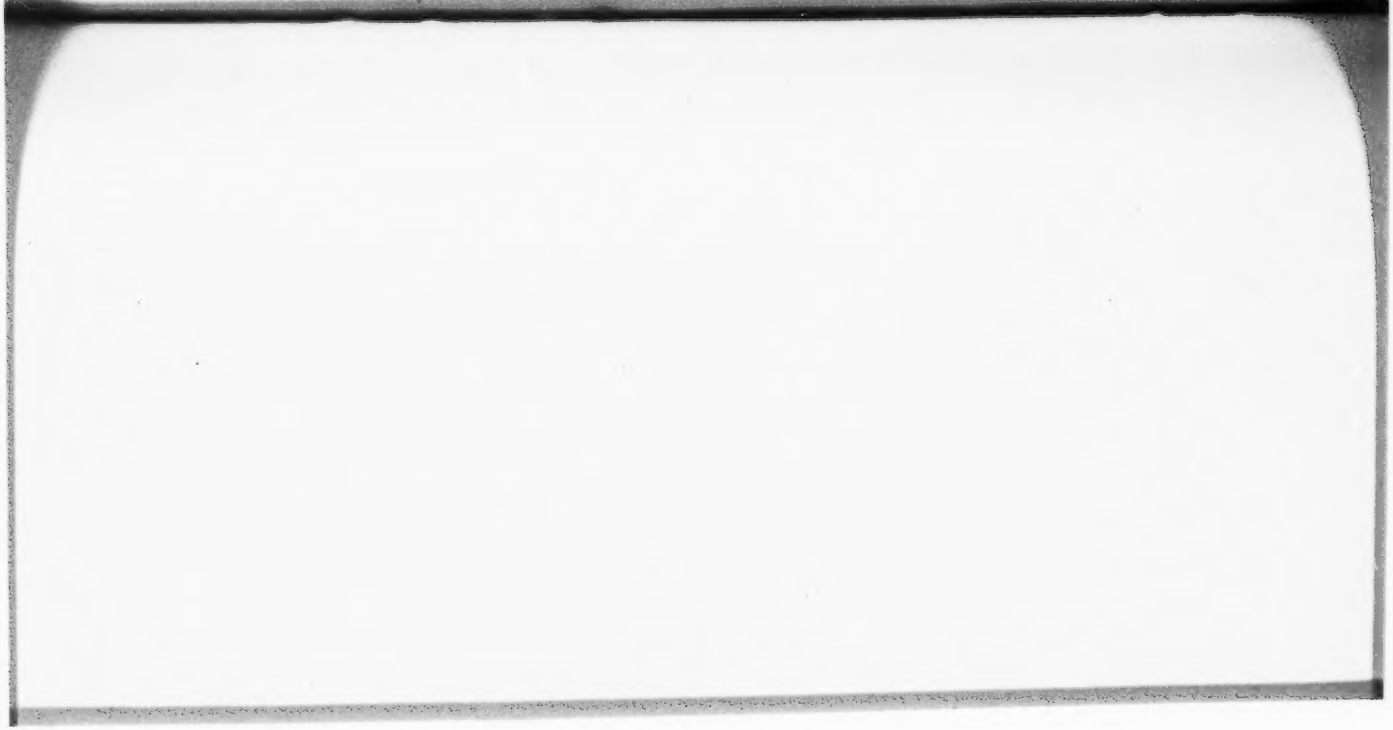
Of Counsel for Petitioner and Appellant.



No. 244.

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Office Supreme Court U. S.
FILED
MAR 22 1900
JAMES H. MCKENNEY
Clerk.

Reply Brf. of Johnson, Dyer & Knauth for Petitioner.

Filed Mar. 22, 1900.

Supreme Court of the United States.

EMILIE SAXLEHNER,
Petitioner,

vs.

EISNER & MENDELSON CO.,
Respondent.

No. 211.

PETITIONER'S BRIEF IN REPLY.

Of the numerous decisions on the question of laches discussed in the brief of respondent's counsel only a few require comment on our part. The authorities relating to that defense in cases other than trade-mark cases have been so thoroughly and exhaustively reviewed in the recent case of *McIntyre* v. *Pryor*, 173 *U. S.*, 38, that it seems to us unnecessary to call them again to the attention of this Court. The only cases which deal of principles relating to trade-marks, referred to by respondent's counsel in this connection, are *Prince's Metallic Paint Co.* v. *Prince Manufacturing Co.*, 57 *F. R.*, *page* 938, and *Coates* v. *Merrick Thread Co.*, 149 *U. S.*, *page* 562.

The case of *Prince's Metallic Paint Co.* presented facts from which it was exceedingly doubtful

whether the complainant had any title to the trade-mark in question, such title being also claimed by the defendant. Indeed, the opinion of the Court seems to have been that defendant had the better title. Under such circumstances the complainant's acquiescence, continued for eight years, in defendant's use of the mark, was held to operate as an estoppel to the assertion of such title. The case is mainly distinguished from the "Hunyadi" controversy in this, that the defendant claimed title to the mark honestly and under certain proceedings which might invest him with such title, that the defendant's doings were free from the taint of fraud, and complainant showed no reason to excuse the delay of eight years in asserting his claim.

The case of *Coates* v. *Merrick Thread Co.*, 149 *U. S., page* 562, involved only a slight infraction of complainant's trade-mark rights, which could be asserted in that case only by the application of very stringent principles. There was no charge of fraud proved or made. Complainant had acquiesced in defendant's use of the spool heads complained of for twelve years without protest, and without ever raising the question of the legality of such use. In that case there was ample opportunity for the complainant to assert these rights, and in view of the small and unsubstantial character of the imitation complained of, this Court came to the conclusion that there was no equity in the complaint.

The argument by which respondent's counsel seek to bring the present controversy within the line of authorities discussed by them, is based upon premises for which there is no proof in the record. The claim is made that the name "Hunyadi" had become GENERIC in Hungary for bitter waters when the labels in question were adopted. *There is no basis in fact for such a contention.* Respondent's brief states, at considerable length, portions of

Ungar's affidavit filed in the suit of the Apollinaris Company in the year 1887, but it goes without saysaying that the mere *ex parte* assertions of Ungar, who was not examined as a witness, do not prove facts, nor is there any proof that the name "Hunyadi," as distinguished from the longer names Hunyadi Janos, Hunyadi Lajos, &c, was used in Hungary in the same manner as, in English speaking countries the name Hunyadi became the colloquial name of complainant's bitter water.

This defense, that the name Hunyadi had become a generic name in Hungary, was raised by all the parties against whom Mrs. Saxlehner commenced proceedings in Hungary in 1891, and the Court will find it discussed at great length in the various Hungarian decrees referred to in our principal brief. This settled the question in controversy in favor of the complainant, and there is nothing in the record of this case to the contrary aside from the *ex parte* statement of Ungar referred to as evidence by respondents. During all this time there were honest waters and honest labels in Hungary and also dishonest waters and labels. The claim that the name Hunyadi had become a generic name in Hungary was immoral and fraudulent in its very nature as shown by the fact, that every one who asserted it resorted also to a fraudulent imitation of Saxlehner's red and white label with its peculiar tripartite division, medallion portrait, combination of colors and other significant detail.

Respondent's argument is further based upon the fact claimed but not proved, that previous to the activity of the Apollinaris Company, Saxlehner had no rights to his name or label in this country for which he would have been entitled to protection. Exactly the contrary has been proved.

The bill of complaint, in paragraph 7, states that the water was exported to this country and received the name "Hunyadi" before the contract with the Apollinaris Company was made. The proofs have

amply shown this, and so far as the legal protection of Saxlehner in the exclusive enjoyment of the name Hunyadi is concerned it could not make any difference whether the water was afterwards more largely introduced and sold in this country. The same is true of the label, which was only changed by adopting a blue ground for the white ground, leaving the red centre field and all the designs thereon as they were before 1876.

The statement in defendant's brief referring to Eisner's first label in red and white colors used on Mattoni's Royal Hungarian Bitter Water, found on page 22 of respondent's brief, is not exact. It is apt to convey the impression that the name Hunyadi Matyas was contained on that label in small print. As a matter of fact it did not. If this label was copied from a German label which contained the words "Hunyadi Matyas Quelle," then Eisner was careful to avoid this name. Eisner had then not yet "investigated the matter" whether he could use the name Hunyadi in the United States with impunity.

Respondent's counsel discuss at length the point that complainant failed to prove that she had no knowledge of the doings of imitators of her name and label in the United States. We have shown in our brief that there is no proof of knowledge on her part of these matters, but we respectfully submit that even should she have had full knowledge of these infringements, she selected the best and most efficient method to stop the further use of the fraudulent names and labels. All these imitating labels were put on the bottles in Hungary by the persons owning and controlling the springs, and from Hungary they were sent out to all parts of the world. If complainant undertook to sue and enjoin the sellers of these imitating waters in France or Spain or Italy or the United States or anywhere else, she had to meet the plausible looking defense that the bottles were labeled in Hungary

and that she should proceed against the originator of the labels rather than the innocent dealers in the waters. She had no means to find out that the Eisner & Mendelson Company claimed some sort of title to the label under which they sold Mattoni's water and *had all reason to believe that if she stopped Mattoni she would thereby stop the Eisner & Mendelson Company* and every other seller of Mattoni's water. This has been the practical effect of her proceedings in Hungary with reference to all waters and in all countries, excepting the defendants in the present suits. With the same degree of justice could a dealer in San Francisco claim, even after the Eisner & Mendelson Company had been enjoined, that *he* had not been notified of any protest of complainant against *his* sales and claim for himself the benefit of the defense of laches. Eisner's lease of the "Franz Deak" Spring, which he fraudulently called "Hunyadi Matyas No. 2," was not recorded in Hungary, but was a mere private document produced for the first time in this suit. Neither was the Eisner & Mendelson Company to be found in Hungary, so that service of process upon it could be had there. Nothing short of an actual suit against the Eisner & Mendelson Company would have been sufficient under the decision of this Court in *Lane & Bodley Co.* v. *Locke*, 150 *U. S.*, 193, to keep alive her rights, if she could lose them by not proceeding at the same time against this vendor of the water, and this suit she could not safely bring until after the year 1895, and eventually until after the decisions of 1896. That the Eisner & Mendelson Company had early knowledge of the suits against the owners of the spring has been proved, and also that since Mattoni & Wille were prevented in Hungary from the further use of the label the water is now imported under small blueish labels bearing the name "Matyas" only, and that with full knowledge of complainant's trade-mark rights, the Hungarian decisions about the same, and with the knowledge

that they are palming off upon a credulous public the water of the "Franz Deak" well as "Hunyadi Matyas" Water, defendants continue to enjoy the benefits of the vast reputation of and demand for complainant's Hunyadi Janos Water.

Respectfully submitted,

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